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No.

In the

Supreme Court of the United States

ERIC RODRIGUEZ, MARTIN MALAVE-DILAN, HOWARD T. ALLEN, JEANNETTE SANTOS, DONALD J. JIRAK, RICHARD FLATEAU, CHARLOTTE A. TAYLOR, MERVYN A. CAMPBELL, SARAH BROCKUS, PATRICIA McDOW, LISA BEST, VICTOR OLUWOLE, RUBEN RANGEL, RUSSELL VELAZQUEZ, GUILLERMO LINARES, ISABEL EVANGELISTA, MARTHA PEPIN, MARISEFA REYES, MARIA URENA, TYRONE ZIMMERMAN, JOSE ALVARADO, IRVIN R. McMANUS, WAYNE HALL, SAMUEL PRIOLEAU, WILLIAM RODRIGUEZ, NEVILLE MULLINGS, MARY ADAMS, EUGENE A. BURNETT, HAZEL PALMORE, and JOHNNY VELEZ,

Appellants,

– against –

GEORGE E. PATAKI, Governor of the State of New York,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

DAVID T. GOLDBERG
99 Hudson Street, 8th Floor
New York, New York 10013

H. REED WITHERBY
SMITH & DUGGAN, LLP
2 Center Plaza
Boston, Massachusetts 02108

RICHARD D. EMERY*
ERIC HECKER
EMERY CELLI BRINCKERHOFF
& ABADY LLP
545 Madison Avenue
New York, New York 10022
(212) 763-5000

* *Counsel of Record*

Attorneys for Appellants

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MARY O. DONOHUE, Lt. Governor and President of the Senate of the State of New York, ELIOT SPITZER, Attorney General of the State of New York, JOSEPH L. BRUNO, President *Pro Tempore* and Majority Leader of the Senate of the State of New York, SHELDON SILVER, Speaker of the Assembly of the State of New York, DAVID A. PATERSON, Minority Leader of the Senate of the State of New York, CHARLES NESBITT, Minority Leader of the Assembly of the State of New York, and CAROL BERMAN, NEIL W. KELLEHER, HELENA M. DONOHUE, and EVELYN J. AQUILA, Commissioners of the New York State Board of Elections,

Appellees.

QUESTIONS PRESENTED

The district court granted summary judgment upholding New York's 2002 Senate redistricting plan, which has a total population deviation of 9.78%, despite overwhelming and uncontradicted evidence that the plan's deviations resulted from the Legislature's deliberate effort to subordinate the goal of population equality to the pursuit of regional and partisan advantage. This appeal presents the following questions:

1. Did the district court err in holding that because the plan's total population deviation is less than ten percent, Plaintiffs could not prevail on their population equality claim without demonstrating that the deviation resulted "solely" from the Legislature's pursuit of illegitimate objectives?

2. Is the pursuit of partisan advantage a legitimate reason for a legislature to purposefully deviate from population equality?

3. Is the desire to preserve the status quo a legitimate reason for a legislature to refrain from drawing districts that reflect population shifts recorded by the most recent decennial Census?

4. Did the district court err in granting summary judgment in the face of overwhelming and uncontradicted record evidence of regional discrimination?

5. Does the federal common law recognize a "legislative privilege" that insulates a legislator and his aide from complying with discovery regarding their construction of a redistricting plan, even where the legislator has voluntarily asserted himself as "lead defendant" and designated the aide to serve as his expert witness?

PARTIES

Plaintiffs-Appellants filing this Jurisdictional Statement are: Eric Rodriguez, Martin Malave-Dilan, Howard T. Allen, Jeannette Santos, Donald J. Jirak, Richard Flateau, Charlotte A. Taylor, Mervyn A. Campbell, Sarah Brockus, Patricia McDow, Lisa Best, Victor Oluwole, Ruben Rangel, Russell Velazquez, Guillermo Linares, Isabel Evangelista, Martha Pepin, Marisefa Reyes, Maria Urena, Tyrone Zimmerman, Jose Alvarado, Irvin R. McManus, Wayne Hall, Samuel Prioleau, William Rodriguez, Neville Mullings, Mary Adams, Eugene A. Burnett, Hazel Palmore, and Johnny Velez.

Defendants-Appellees are George E. Pataki, Governor of the State of New York, Mary O. Donohue, Lt. Governor and President of the Senate of the State of New York, Eliot Spitzer, Attorney General of the State of New York, Joseph L. Bruno, President Pro Tempore and Majority Leader of the Senate of the State of New York, Sheldon Silver, Speaker of the Assembly of the State of New York, David A. Paterson, Minority Leader of the Senate of the State of New York, Charles Nesbitt, Minority Leader of the Assembly of the State of New York, and Carol Berman, Neil W. Kelleher, Helena M. Donohue, and Evelyn J. Aquila, Commissioners of the New York State Board of Elections.

Plaintiff-Intervenors below, who are not parties to this appeal, were the Latino Voting Rights Committee of Metro New York, Mayra Cappas, Raquel Emilia Batista, Jose Dominguez, Alice Cardona, Genaro Herrera, David Galarza, the Latino Voting Rights Committee of Suffolk County, Joseph Lopez, Enrique Gomez, Peter K. Lau, John Kuo Wei Tchen, Mindy Kim, Sachi Dastidar, Tara Singh, Sandra Rivers, Rosemari Mealy, Ronald Cranshaw, Sandra Bradford, Leslie Barbour, Michelle Romero, William O. Low, Cecilia Guiterrez, Evelyn Miller, Seretta C. Mcknight, Tracey Edwards, Donna Swain, Ann Jones, the New York State Council of Black Elected Democrats, Cherry Weinstein, Lynn Elfe, David Gantt, William Johnson, Wade Norwood, Ronnie Thomas, Arthur O. Eve,

Charles H. Fisher III, James W. Pitts, Beverly Gray, George A. Holt, Jr., and Louise Slaughter.

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OPINIONS BELOW

The district court's opinion granting Defendants summary judgment is reported at 308 F. Supp. 2d 346 (S.D.N.Y. 2004), and is reproduced at 1a. The orders of the magistrate judge relating to the Senate Majority Leader's assertion of "legislative privilege," together with the district court's affirmances thereof, are reproduced at 183a.

JURISDICTION

This is an appeal from the March 19, 2004 final judgment of a three-judge court of the United States District Court for the Southern District of New York. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1253 and 2101(b). Pursuant to Rule 18(3) of this Court, Justice Ginsburg granted Plaintiffs' application for an extension for filing this Jurisdictional Statement through and including August 12, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Rule 501 of the Federal Rules of Evidence provides: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

STATEMENT OF THE CASE

This appeal presents several pressing issues that were left unresolved by this Court's summary affirmance in *Cox v. Larios*, 124 S. Ct. 2806 (2004), including: the nature of a plaintiff's burden in a population inequality claim where the total deviation in a legislative redistricting plan is below ten percent, the types of objectives that legislatures may legitimately pursue when purposefully departing from population equality, and the extent of a legislature's obligation to comply with discovery relating to whether it engaged in the "honest and good faith effort" to draw districts of equal size that is required by *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny. These issues have assumed heightened significance in the wake of *Larios*, which settled that a redistricting plan with a total population deviation below ten percent is not *per se* immune from constitutional scrutiny. *See Larios*, 124 S. Ct. at 2808 (Stevens, J., concurring); *id.* at 2809-10 (Scalia, J., dissenting).

Plaintiffs claim that New York's most recent redistricting of its Senate districts (the "2002 Senate Plan" or the "Plan") violates the equal representation principle to which this Court has adhered since *Reynolds*. As in *Reynolds* and *Larios*, the 2002 Senate Plan evidences a stark, methodical pattern of geographic discrimination in favor of one region of the State and against another. Every single Senate district in upstate New York is substantially underpopulated, and every single downstate district is substantially overpopulated, with a total population deviation of 9.78%. The record contains overwhelming evidence, both circumstantial and direct, confirming—or at least establishing a prima facie case—that this was no accident, but rather resulted from the Legislature's deliberate effort to maintain the existing number of upstate Senate districts in the face of the substantial downstate population shift revealed by the 2000 Census.

The district court granted Defendants summary judgment, holding that because the Plan's total population deviation is below ten percent, Plaintiffs were required to demonstrate that

the deviation resulted "solely" from impermissible redistricting considerations. (J.S. 24a, 25a-26a). The court concluded that Plaintiffs could not satisfy this standard as a matter of law, finding that Plaintiffs' evidence failed to rule out the possibility that the Plan's stark pattern of regional discrimination was motivated by the desire to achieve partisan advantage, which the court apparently viewed as a legitimate state interest. *Id.* 2a, 4a, 30a. The court also found that the population disparities promoted the supposedly legitimate state interests of preserving existing districts and avoiding incumbent pairings. *Id.* 3a, 28a, 34a. The district court's decision is erroneous in numerous respects.

To begin with, the district court applied the wrong legal standard. Nothing in this Court's jurisprudence supports the novel proposition that a population inequality claimant must demonstrate that a plan's deviations were caused "solely" by impermissible redistricting considerations. Much to the contrary, this Court has repeatedly reaffirmed that redistricting plans must be "free from *any taint* of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (emphasis supplied). The district court's "solely" standard, which is as a practical matter impossible to meet, effectively resurrects the ten percent "safe harbor" that *Larios* squarely rejected.

The district court also erred in holding that purposeful regional discrimination can be justified by partisanship. This view is based on a false premise: that evidence of partisan motivation can prove absence of discrimination based on population in the same way that, in a claim brought under *Shaw v. Reno*, 509 U.S. 630 (1993), evidence of partisan motivation can prove absence of discrimination based on race. In the *Shaw* context, however, evidence of partisan motivation is proffered as an *alternative explanation* to purposeful discrimination: "We didn't discriminate on the basis of race; rather, we drew the lines because of politics." Here, in contrast, the district court recognized partisan motivation as a *justification* for purposeful discrimination: "We intentionally

deviated from population equality, but we did it because of politics." This Court has never held that the desire to gain partisan advantage justifies deliberately deviating from population equality. To the contrary, "the equal-population principle remains the only clear limitation" on the ability of legislatures to engage in partisan gerrymandering. *Larios*, 124 S. Ct. at 2808 (Stevens, J., concurring); *accord Reynolds*, 377 U.S. at 578-79 (recognizing that judicial enforcement of equal representation duty counteracts "partisan gerrymandering").

The district court further erred by ignoring the fact that the Legislature did not apply its supposedly "legitimate" redistricting considerations *evenhandedly*. *See Brown v. Thomson*, 462 U.S. 835, 843, 845-46 (1983) (requiring "consistency of application" and "neutrality of effect" in applying nonpopulation redistricting criteria); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (only "consistently applied" legislative policies can justify deviating from population equality). The court concluded, for example, that it was permissible to avoid pairing incumbents without considering the fact that the Legislature sought to protect *upstate* incumbents but gratuitously paired four downstate incumbent Democrats.

Nor did the district court consider whether the State's asserted interest in preserving the status quo can justify a deliberate failure to implement the Census, particularly on such a broad scale as in this case. Preserving districts is not one of the traditional redistricting criteria recognized by the New York Constitution, *see* N.Y. CONST. art. III, § 4, and that goal is fundamentally at odds with the overarching requirement of the Equal Protection Clause that redistricting plans must strive to reflect population shifts revealed in the most recent Census.

Finally, the district court erred in ruling that the Senate Majority Leader is protected by a federal common law "legislative privilege" that purportedly insulates him from discovery into why the Plan contains a discriminatory pattern of population deviations. (J.S. 183a). Even assuming that some type of qualified privilege exists – a dubious proposition – any asserted interest in legislative secrecy is outweighed in this case

by Plaintiffs' countervailing need to discover whether the Legislature discharged its solemn constitutional obligation to make a good faith effort to construct districts of equal size. In any event, the Senate Majority Leader waived whatever privilege otherwise might have applied by voluntarily asserting himself as "lead defendant" and by presenting as an expert witness an aide who served as the principal drafter of the Plan.

Despite the district court's erroneous privilege rulings, Plaintiffs were able to adduce considerable direct evidence confirming—or at a bare minimum enabling a reasonable factfinder to conclude—that the 2002 Senate Plan was not the result of an "honest and good faith effort" to achieve population equality. To the contrary, the record demonstrates convincingly that the drafters of the Plan deliberately subordinated population equality considerations to their paramount objective of manipulating population disparities to achieve as much regional and partisan advantage as they believed they could get away with.

FACTUAL AND PROCEDURAL BACKGROUND

The United States Census Bureau released the official results of the 2000 Census in March 2001. The Census data revealed that New York's population increased by almost one million during the 1990s. More than 76% of the State's overall growth occurred in New York City and its northern suburbs. (J.S. 268a). In the areas north and west of Albany, population actually fell between 1990 and 2000. *Id.* 249a. Because of this significant shift, the then-existing Senate districts (which had been drawn in 1992 following the 1990 Census) had a total population deviation far in excess of ten percent and were presumptively unconstitutional.

Indeed, the growth in population of the downstate region of the State relative to the upstate region was large enough to warrant shifting an entire Senate district from the upstate region to the downstate region. As of 2001, the then-existing

downstate Senate districts were overpopulated by 362,279 (enough population to constitute 1.16 ideally sized districts), and the upstate districts were underpopulated by 311,089 (enough population to constitute 1.02 ideally sized districts). (J.S. 238a-239a).

By January 2002 – ten months after the official 2000 Census data were released – the New York Legislature had made little public progress reapportioning its Senate districts. Plaintiffs therefore filed parallel lawsuits in state court and in federal district court seeking to compel the Legislature to redraw its Senate (and Assembly and Congressional) districts in conformance with the requirements of the Equal Protection Clause.

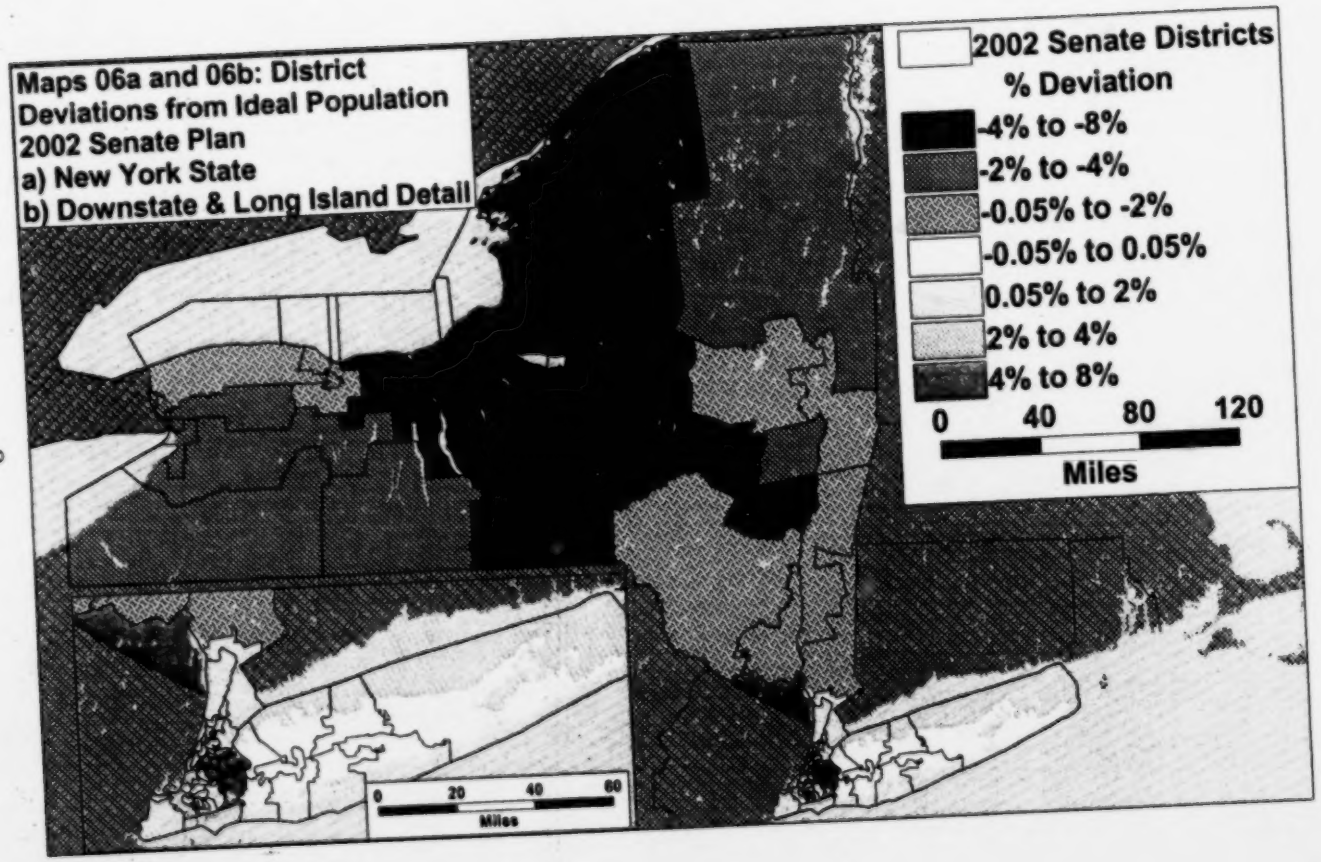
Meanwhile, the Legislature began the process of devising a plan for reapportioning its Senate districts in light of the 2000 Census. Under New York law, the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") – a committee appointed by the legislative leadership consisting of both legislators and non-legislators – is charged with the task of developing redistricting plans and making redistricting recommendations to the Legislature. *See* N.Y. LEGIS. LAW § 83-m. In or about August 2001, LATFOR posted a notice on its website stating that the average Senate District population "will increase" to 311,089 – the figure for a 61-seat Senate. Throughout late 2001 and early 2002, a number of groups submitted proposed 61-seat redistricting plans to LATFOR.

In mid-February 2002, LATFOR's co-chairmen released a Senate redistricting proposal that had been developed by the Republican Senate Majority, announcing for the first time the plan to increase the size of the Senate from 61 seats to 62. The record contains evidence demonstrating that the Senate Majority actually made the decision to increase the size of the Senate in October 2001, four months before the public announcement. Because of this delay, all of the 61-seat plans submitted by the public were rendered obsolete. The Legislature enacted the Senate Majority's redistricting proposal

(with minor adjustments) in April 2002.

On its face, the 2002 Senate Plan systematically discriminates against residents of New York's downstate region (a contiguous cluster of 29 districts comprising New York City and its northern suburbs) and in favor of residents of the upstate region (a contiguous cluster of 24 districts running from northern Westchester County to the north and west). Every single downstate district is substantially overpopulated, and every single upstate district is substantially underpopulated, with a total population deviation of 9.78%. The map reproduced below, which depicts underpopulated districts in red and overpopulated districts in green,[1] demonstrates the Plan's consistent and methodical regional bias:

[1] The nine Long Island districts are shown in white, because the population of each is within five one-hundredths of one percent (0.0005) of the ideal district size.


Maps 06a and 06b: District Deviations from Ideal Population
2002 Senate Plan
a) New York State
b) Downstate & Long Island Detail
2002 Senate Districts
% Deviation
-4% to -8%
-2% to -4%
-0.05% to -2%
-0.05% to 0.05%
0.05% to 2%
2% to 4%
4% to 8%
0 40 80 120
Miles
0 20 40 60
Miles

(J.S. 272a-273a).[2]

It is undisputed that the Legislature easily could have drawn a plan with far lower population deviations and with greater adherence to the other redistricting requirements of the New York Constitution, *see* N.Y. CONST. art. III, § 4, including compactness and county integrity. (J.S. 259a-263a, 271a). These facts, coupled with the fact that the total population deviation comes within a whisper of the ten percent threshold of presumptive unconstitutionality, give rise to a strong inference that the Legislature did not engage in the requisite "honest and good faith effort" to achieve population equality. Rather, the objective characteristics of the Plan indicate that the Legislature deliberately refrained from shifting a Senate district from the upstate region to the downstate region—notwithstanding the population shifts documented in the 2000 Census—opting instead to preserve the number of upstate districts, and to manipulate district lines just enough to bring the total population deviation below ten percent. Because of this powerful circumstantial evidence of bad faith, Plaintiffs amended their complaint to challenge the constitutionality of the 2002 Senate Plan.

Defendants removed the state court action to the district court, where it was consolidated with the pending federal action. Senator Joseph Bruno, the Senate Majority Leader, volunteered to serve as "lead defendant" on behalf of all Defendants. Defendants then moved to dismiss, arguing (i) that a redistricting plan with a total population deviation below ten percent is *per se* exempt from a population equality challenge, and (ii) that claims of regional population discrimination are not cognizable as a matter of law. The district court denied Defendants' motion.

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[2] The average overpopulation of the 29 downstate districts is 2.37%. This excess population would constitute 68.80% of a district. The average underpopulation of the 24 upstate districts is 2.86%, which amounts cumulatively to 68.57% of a district. The Plan thus cheats the downstate region of approximately seven-tenths of a district. (J.S. 250a-251a, 256a-257a, 270a).

Defendants resisted participating in document discovery (beyond the production of documents that were already in the public domain). The Majority Leader asserted "legislative privilege," which he claimed insulates legislators and their staffs from the obligation to disclose documents or provide other discovery revealing how and why the Senate district lines were drawn. The discovery dispute was referred to a magistrate judge, who rejected the Majority Leader's assertion of an absolute legislative privilege, but largely ruled in his favor on the basis of a qualified privilege akin to the deliberative process privilege that can apply to Executive Branch officials. (J.S. 187a-205a). The magistrate judge held that Plaintiffs had, for the most part, failed to demonstrate sufficient need for discovery to overcome the qualified privilege, but that Plaintiffs were entitled to discover a small number of documents that had already been shared with non-legislator members of LATFOR, *id.* 213a-215a – including four memoranda sent by Mark Burgeson, the primary drafter of the Plan,[3] to the Senate Majority leadership. *Id.* 274a-282a. The district court affirmed these privilege rulings. *Id.* 206a-209a, 228a-232a.

Despite the largely successful assertion of privilege, the few memoranda that Defendants were compelled to produce provide powerful direct evidence of what is objectively obvious on the face of the Plan: that its drafters purposefully preserved the old upstate Senate districts – notwithstanding the contrary 2000 Census data – in a deliberate scheme to achieve as much regional and partisan advantage as possible without causing the total population deviation to cross what they perceived to be a constitutionally dispositive ten percent threshold.

The evidence demonstrated that the drafters of the 2002

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[3] Burgeson served as special assistant to Senator Dean Skelos, the Republican Senate Majority co-chairman of LATFOR. Burgeson developed the 2002 Senate Plan in close consultation with the Majority Leader, with Senator Skelos (who was appointed to LATFOR by the Majority Leader), with Steven Boggess (the Secretary of the Senate, who is the Majority Leader's chief aide), and with Vincent Bruy (a non-legislator who also was appointed to LATFOR by the Majority Leader).

Senate Plan began the redistricting process based upon this immutable premise: that the number of districts in the areas west of the Hudson River and north of Albany would remain unchanged at 23. (J.S. 274a).[4] In a memorandum to Senator Skelos and Secretary Boggess, Burgeson explained that he had intentionally drawn these upstate districts "light" (*i.e.*, underpopulated) for the express purpose of "avoid[ing] migration downstate" (*i.e.*, to prevent a shift in the allocation of a district from the upstate region to the downstate region). *Id.* 279a. During his deposition, Burgeson admitted that this memorandum was intended to convey his intent to "maintain[] the current representation upstate as it was." *Id.* 287a.

Given the premise that the upstate districts would be intentionally underpopulated, the issue became how to draw the remaining portion of the State: the area east of the Hudson River, stretching from Columbia County (just southeast of Albany) south through the Hudson Valley and New York City to the Queens-Nassau border. *Id.* 274a, 277a-278a, 281a-282a.

In dividing up this remaining redistricting zone, the drafters took advantage of an opportunity to underpopulate two additional upstate districts (beyond the upstate districts that had already been drawn "light"). Through what he boasted was a "manipulation of town combinations," Burgeson "was able to take advantage of" New York's so-called "town on border" rule to draw Districts 41 and 40 "a little bit 'lite' [sic] at 301,541 and 303,359 respectively."[5] *Id.* 282a. As a result of that purposeful "manipulation," these two additional upstate districts were deliberately underpopulated, and the remaining

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[4] The drafters also recognized that the Long Island region (comprising Nassau and Suffolk Counties), which had grown at a rate almost exactly the same as the statewide average, naturally stood to retain its previous nine Senate districts – all of which were (and are) held by Republican incumbents.

[5] Article III, section 4 of the New York Constitution provides that where two Senate districts adjoin within a county, their populations may not differ by more than the population of the least populous town on the district boundary. This is the so-called "town-on-border rule" that Burgeson "t[ook] advantage of."

districts were even further overpopulated. *Id.* 282a.

The drafters of the Plan then turned their attention to bolstering a Republican district in the Bronx that had become vulnerable because, between 1990 and 2000, substantial numbers of minority voters had moved in and substantial numbers of white voters had moved out. The drafters schemed to transfer as much population as possible from overwhelmingly white southern Westchester into this Bronx district.[6] They evaluated which of several possible "combination of counties" would best effectuate this partisan goal, concluding that leaving Queens County "intact"—*i.e.*, drawing districts entirely within the County without crossing its border—would yield the largest possible number of Westchester residents that could be connected to the Bronx.[7] *Id.* 277a-278a, 281a-282a. The direct result of this partisan gambit was that population deviations increased markedly: Had Kings County (Brooklyn) been kept intact, each of its districts would have been only 0.68% above the statewide mean, compared with 4.05% for each of the Queens County districts that were created. *Id.* 275a. The decision about which county to keep intact—and not to keep both intact—was based entirely on the goal of maximizing partisan advantage in the Bronx. No consideration was given to minimizing population inequality, nor was preserving counties considered an end in itself.

The drafters realized they had a big problem in apportioning the remaining districts. The remaining area had an aggregate population of 6,536,447. If that population were divided among 20 districts (as part of a 61-seat Senate), the average population in each of those districts would be 326,822.

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[6] Burgeson wrote that one of the main "parameters" in redistricting the remaining area of the State was to "determin[e]" how to "result[] in the greatest population in Westchester connecting to Bronx." (J.S. 277a). *See also id.* 282a (stating that the redistricting "method" was to "maximiz[e] the Westchester total" that would be "connected to Bronx").

[7] One of Burgeson's memoranda is entitled "The 135"—a reference to the 135,033 Westchester residents that proved to be the maximum number that could be connected to the Bronx. (J.S. 281a-282a).

Because the least populous district in the 2002 Senate Plan has a population of 290,925, the result would have been a total deviation of 11.54% of the mean for a 61-seat Senate—well above the ten percent threshold that the Plan's drafters studiously sought to avoid. They therefore increased the size of the Senate from 61 districts to 62. The resulting Plan has a total deviation of 9.78%, just a hair under the ten percent threshold they considered to be a safe harbor.[8]

Once the drafters identified a way to reduce the total deviation to just below ten percent, they simply stopped, making no further effort to reduce population deviations. Their goal was merely "to craft districts whose population falls within the acceptable overall deviation of 10%." (J.S. 282a). Indeed, Burgeson testified candidly that he assumed that any total deviation up to ten percent is constitutionally acceptable. *Id.* 284a, 286a. Other than staying within ten percent, the drafters paid no attention to the notion that population deviations should be minimized, if not avoided altogether.

Despite this formidable record of deliberate regional bias and indifference to population equality, Defendants moved for summary judgment. Consistent with their assertion of legislative privilege, Defendants did not proffer a shred of evidence—not a single document, nor a single word of testimony from any witness—regarding the *actual* reasons why the Plan contains a systematic pattern of regional discrimination with a total population deviation approaching ten percent. Defendants relied instead on what they characterized as an "objective" analysis of the redistricting goals they claimed the Plan *appears* to serve on its face,

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[8] The drafters of the Plan also considered what regional and partisan advantage could be gained by further increasing the size of the Senate to 63 seats. They concluded, however, that increasing the Senate to 63 seats would not afford the Republicans "the opportunity to pick up a district," because all of the upstate Republican districts had already been drawn as "light" as possible. (J.S. 279a-280a). For this reason, "[a]dding another district anywhere upstate would exacerbate that situation" - that is, the upstate districts could not be made any "lighter" without pushing total population deviations over ten percent. *Id.*

including a putative "expert" report on that subject by none other than Burgeson himself. Although Burgeson purported to opine on the purposes the Plan *seems* to serve, Defendants nonetheless would not allow Burgeson to be cross-examined about whether his "objective" presentation was consistent with the redistricting goals that he and the other drafters of the Plan *actually* pursued. The magistrate judge ruled, and the district court affirmed, that Defendants' reliance on Burgeson's "expert" report did not open the door to discovery of his personal experience as chief architect of the Plan. (J.S. 220a-221a, 231a-232a).

Plaintiffs opposed summary judgment not only by relying on the copious evidence of purposeful population discrimination discussed above, but also by pointing to evidence confirming that each of the three "legitimate" reasons that Defendants offered for the Plan's population deviations was pretextual.

First, Defendants claimed that the population deviations contained in the Plan were necessary to preserve county borders, especially the Queens County border. Uncontradicted evidence confirmed, however, that Defendants easily could have drawn a plan that divided far fewer counties with significantly lower population deviations. The record leaves no doubt, moreover, that the Plan's drafters preserved the Queens County border not to further any lofty ideal that counties should be kept intact, but rather because that option enabled them to shift more white population from Westchester County into a vulnerable Republican district in the Bronx than any other "combination of counties" they considered.

Defendants also claimed that the population deviations contained in the Plan resulted from a policy of avoiding incumbent pairings. That too is false. Although the Plan pairs no upstate or Republican incumbents, the Plan's drafters bent over backward to pair two sets of downstate Democratic incumbents, conspicuously leaving nearby open seats in both instances.

Finally, Defendants claimed that the population deviations contained in the Plan were necessary to preserve existing districts. The evidence demonstrates, however, that the drafters of the Plan were interested in preserving *upstate* but not downstate districts, notwithstanding the Census data that they were well aware dictated otherwise.

The district court nevertheless granted Defendants' motion for summary judgment. The court held that because the total deviation is below ten percent, Plaintiffs can prevail only by demonstrating that the deviations resulted "solely" from the pursuit of improper redistricting goals. (J.S. 24a, 25a-26a). Viewing the record in the light most favorable to Defendants—contrary to elementary principles of summary judgment practice—the court credited Defendants' "objective" claim that the drafters of the Plan were motivated, at least in part, by "permissible" redistricting considerations. *Id.* 28a-30a. Noting that 21 of the 24 upstate incumbents were Republicans, *id.* 30a, the court found that the Plan's pattern of discrimination was motivated at least in part by partisanship, as well as by the desire to preserve prior districts and avoid incumbent pairs, and concluded accordingly that Plaintiffs could not meet the "solely" standard as a matter of law. The court refrained from addressing (much less crediting) any of the copious evidence of purposeful regional discrimination discussed at length above.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The District Court Erred in Concluding That Plaintiffs Failed to Demonstrate Unconstitutional Population Discrimination

A. The Record Contains Overwhelming Evidence of Purposeful Regional Discrimination

It is axiomatic that the Equal Protection Clause forbids a State from drawing legislative districts that deviate from population equality in a manner that favors the residents of one geographic region in the State over another:

> [T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to . . . place of residence within a State.

Reynolds, 377 U.S. at 560-61; *see also Abate v. Mundt*, 403 U.S. 182, 185-86 (1971) ("underscor[ing]" the "danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests"); *Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50, 57 (1970) (striking down voting scheme that resulted in "a systematic discrimination against voters in the more populous school districts"); *Wells v. Rockefeller*, 394 U.S. 542, 546 (1969) ("To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations."); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653-54 (1964) (striking down a plan containing "a built-in bias against voters living in the State's more populous counties").[9]

Although State legislatures are afforded a modicum of discretion to pursue certain traditional redistricting objectives other than population equality, this Court has never wavered from the bedrock constitutional imperative that districting plans must be "free from any taint of arbitrariness or discrimination." *Roman*, 377 U.S. at 710. Those cases that have acknowledged the limited discretion of States to pursue other legitimate redistricting objectives have also taken pains to emphasize that, in order to withstand constitutional scrutiny, such policies must be consistently and neutrally applied. *Brown*, 462 U.S. at 843, 845-46; *Karcher*, 462 U.S. at 740.

The uncontradicted evidence confirms that the drafters of the 2002 Senate Plan did not make the required "honest and good faith effort" to achieve population equality. The Plan

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[9] *See also Larios v. Cox*, 300 F. Supp. 2d 1320, 1342-47 (N.D. Ga.), *aff'd*, 124 S. Ct. 2806 (2004); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051-52 (S.D. Ill. 2001); *Roxbury Taxpayers Alliance v. Delaware County Bd. of Supervisors*, 886 F. Supp. 242, 254 (N.D.N.Y. 1995); *Licht v. Quattrocchi*, 449 A.2d 887 (R.I. 1982).

contains a clear and consistent pattern of discrimination that methodically favors the upstate region of the State over the downstate region. Moreover, Plaintiffs have adduced abundant evidence confirming beyond dispute that the Plan resulted from a deliberate scheme to maintain the existing, outdated level of representation of the predominantly rural, Republican, white upstate region at the expense of the largely urban, Democratic, minority downstate region, and to otherwise exact as much partisan advantage from the redistricting process as possible without causing the total deviation to cross what the drafters perceived to be a constitutionally dispositive ten percent threshold.

This is not a case in which the drafters of a plan inadvertently or incidentally created substantial population deviations and then failed to take adequate steps to reduce or eliminate them. Here, it was the drafters' *conscious purpose* to draw districts with substantial population deviations. The record is clear that they intentionally drew the upstate districts "light" in blatant disregard of Census data that they knew required the "migration" of a district from upstate to downstate. They resorted to the deliberate "manipulation" of New York's town-on-border rule in order to maximize the number of upstate districts that could be underpopulated. And they purposefully crafted a downstate configuration that maximized partisan advantage while keeping the total population deviation just under ten percent, even though they knew full well that the deviation could be substantially reduced through a variety of other configurations.

The district court's opinion barely mentioned these demonstrated motivations, much less did it view the evidence in the light most favorable to Plaintiffs. To the contrary, and in blatant disregard of the most fundamental rule of summary judgment practice, *see Hunt v. Cromartie*, 526 U.S. 541 (1999), the district court discounted Plaintiffs' evidence and credited Defendants' asserted justifications, concluding as a matter of law that the deviations resulted from "many permissible redistricting considerations." (J.S. 28a). That conclusion is

belied by the mountain of evidence discussed above, which the district court improperly ignored.

Instead of grappling with the copious evidence of purposeful regional discrimination, the district court suggested that Plaintiffs' definitions of the upstate and downstate regions are "self-serving and defective," dismissing those definitions as "tailored to suit [Plaintiffs'] litigation strategy." (J.S. 31a). Plaintiffs never contended, however, that there are any talismanic "definitions" of New York's upstate or downstate regions. Those terms were used only as a shorthand description of the geographic areas that *Defendants* deliberately chose to under- and overpopulate—as evidenced, for example, by Burgeson's statement, made long before this litigation was commenced, that the "upstate" districts had been underpopulated to avoid migration of a district "downstate." *Id.* 279a. The notion that a regional discrimination claim fails as a matter of law unless the bias happens to coincide perfectly with pre-existing "generally accepted" definitions of the affected regions is absurd—especially here, where the record contains uncontradicted evidence demonstrating that any number of possible variants on the definition of "downstate" would change the arithmetic of the malapportionment very little (if, for example, Rockland County were excluded) or not at all (if Long Island were included). *Id.* 251a-252a & n.1.[10]

The district court also found that the evidence adduced by Plaintiffs failed to account for the "reality" that on the basis of citizen voting age population ("CVAP"), the downstate region could be characterized as overrepresented. (J.S. 32a-33a). But the Legislature reapportioned on the basis of *total* population, as the New York Constitution expressly requires, *see* N.Y. CONST. art. III, § 5-a, not on the basis of CVAP. And as the district court recognized, a State's choice to redistrict based on total population is constitutionally valid. *See Garza v. County of Los Angeles*, 918 F.2d 763, 774-76 (9th Cir. 1990); *Daly v. Hunt*, 93

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[10] *Larios* found unconstitutional regional discrimination notwithstanding the fact that "the various witnesses had different ways of defining the boundary between north and south Georgia." 300 F. Supp. 2d at 1323 n.1.

F.3d 1212, 1223-27 (4th Cir. 1996); *Chen v. City of Houston*, 206 F.3d 502, 523-28 (5th Cir. 2000). The Equal Protection Clause, after all, protects "persons," not merely voting age citizens.[11]

B. The District Court Applied the Wrong Legal Standard

The district court held that Plaintiffs must demonstrate that the population deviations in the 2002 Senate Plan resulted "*solely* from the promotion of an unconstitutional or irrational state policy." (J.S. 24a-25a) (emphasis in original). According to the district court, in other words, identifying *any* ostensibly legitimate purpose that the Plan may serve defeats Plaintiffs' claim as a matter of law, even if the Legislature was motivated *primarily* by illegitimate purposes.

The district court's "sole purpose" test cannot be reconciled with *Roman v. Sincock*, which plainly condemns any population deviations created *even in part* for illegitimate purposes—*i.e.*, with "*any taint* of arbitrariness or discrimination." 377 U.S. at 710 (emphasis supplied); *see also Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (holding that to prevail on a population equality claim where the total deviation is less than ten percent, a plaintiff must only produce "further evidence," in addition to population deviation statistics alone, "to show that the apportionment process had a 'taint of arbitrariness or discrimination' ") (quoting *Roman*).[12]

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[11] The district court also suggested that New York City "controls" a number of districts that is roughly proportional to its share of the State's population. (J.S. 31a-32a). In divining the number of districts ostensibly "controlled" by New York City, the court included two districts that are only *partially* within the City. Not only does the record contain no evidence whatsoever that New York City "controls" either of these partial districts, but the drafters of the Plan purposefully siphoned 135,000 residents from Westchester ("The 135") in order to *prevent* City voters from controlling one of the partial districts. (J.S. 277a, 281a-282a).

[12] The case cited by the district court as establishing the "solely" standard, *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md.1994), plainly did not survive the Fourth Circuit's subsequent decision in

Moreover, the "sole purpose" standard is, as a practical matter, virtually impossible to meet. Redistricting is an enormously complicated process, involving many different interests and players. While it is often possible to divine the *principal* reasons why a plan was drawn in a given manner, one can never know *all* of the myriad factors that went into the mix.

Sophisticated redistricters who are intent on manipulating population deviation for illegitimate purposes will *always* be able to pay lip service to various traditional redistricting objectives, for even the most gerrymandered and blatantly discriminatory plans take *some* account of such traditional redistricting considerations as compactness and contiguity. Inevitably, imposing a "sole purpose" test where deviations are below ten percent is the functional equivalent of holding that ten percent is a safe harbor. The standard imposed by the district court is therefore directly at odds with this Court's affirmance in *Larios*, which unambiguously rejected the invitation to create a buffer zone within which redistricting plans are immune from population equality scrutiny.[13]

Daly. In any event, the result in *Marylanders* did not depend on the ultra-stringent "solely" formulation, for the court held that the plaintiffs had offered no evidence that the alleged illegitimate purpose—overrepresenting the City of Baltimore—played *any* role in causing the challenged population deviations. *See* 849 F. Supp. at 1036.

[13] The "solely" standard also would sanction, as the district court expressly did, the conscious decision by the Plan's drafters to make *no effort whatsoever*—much less the constitutionally requisite "honest and good faith effort"—to reduce or eliminate population deviations once the total deviation dipped just below ten percent. (J.S. 27a) (recognizing that the drafters merely sought to stay within ten percent, but holding that "[n]o invidious purpose can be inferred from such conduct alone"). This Court has repeatedly warned about precisely this scenario. *See Karcher*, 462 U.S. at 731 ("If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality."); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("[T]o consider a certain range of variances de minimis would encourage legislators to strive for the range rather than for equality as nearly as practicable."); *see also Vigo County Republican Central Committee v. Vigo County Commissioners*, 834 F. Supp. 1080, 1085-86 (S.D. Ind. 1993) (striking down a plan the "impetus" of which was

The district court also suggested that any lesser standard would open the floodgates to claims based on "scant evidence of ill will." (J.S. 25a). But experience from those jurisdictions that do not apply the "solely" standard demonstrates that challenges to plans with deviations below ten percent are exceedingly rare, and that a more measured standard can be applied without inviting baseless litigation. In any event, the evidence of purposeful discrimination in this case is anything but "scant." Applying a "solely" test to the facts presented here would mean that the Legislature may, with impunity, deliberately and gratuitously deviate from population equality for the purpose of gaining regional or partisan advantage, so long as it can be said that the scheme also happens, to some extent, to promote other legitimate interests that do not conflict with the primary invidious objectives.

C. The Desire to Maximize Partisan Advantage Is Not a Legitimate Basis for Deviating From Population Equality

The district court's opinion was premised on the assumption that so long as the total population deviation remains within ten percent, it is permissible for a legislature to deliberately construct districts of unequal size for the purpose of gaining partisan advantage. (J.S. 2a, 4a, 30a). This was error.

Where a plan has a total population deviation over ten percent—and thus is presumptively unconstitutional, *see Voinovich v. Quilter*, 507 U.S. 146, 161 (1993)—it unquestionably would be insufficient for a legislature to defend the deviation by asserting that it served partisan purposes. Given that partisan politics is not a legitimate reason for deviating from population equality in a plan with a total deviation above ten percent, it follows that it cannot be a legitimate reason for

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"simply to move precincts between districts until the population deviation was less than 10% and then stop, despite the fact that it was possible to achieve districts with a significantly lower population deviation").

deviating under ten percent. A State has no legitimate interest in the entrenchment of whatever political party happens to control the redistricting process.

The district court's suggestion that Plaintiffs have the burden of proving the existence of geographic animus independent of partisanship is mistaken in two ways. First, the Court fundamentally misconceived the nature of the partisanship issue presented here, which it conflated with the very different issue presented in *Easley v. Cromartie*, 532 U.S. 234 (2001). Here, the issue is not whether partisanship *negates* the impermissible motive, but rather whether partisanship *justifies* the purposeful departure from population equality. Because Defendants' reliance on politics as an excuse does nothing to change the fact that they plainly engaged in purposeful regional population discrimination, the partisanship issue cannot rescue them. *See Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J. concurring) (discussing the difference between animus and intent to discriminate).

Second, the district court treated partisanship as an affirmatively legitimate ground for deliberately deviating from population equality—the implication being that it would be perfectly acceptable for the Legislature to intentionally draw districts with a 9.99% deviation so long as doing so would elect more Republicans than if the districts were drawn equally. But *Larios* condemned a plan with a deviation under ten percent precisely because the malapportionment resulted from the pursuit of partisan advantage. Indeed, this Court's decision in *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004)—far from suggesting that a legislature may purposefully manipulate district population levels for political gain—confirmed that partisan gerrymandering is illegitimate. The issue presented in *Vieth* was not whether partisanship is an acceptable aspect of redistricting, but rather whether there are *remedies* for partisan

gerrymandering that are judicially manageable.[14]

As two Justices of this Court recently explained in *Larios*, after *Vieth*, "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength." 124 S. Ct. at 2808 (Stevens, J., concurring). *Larios* thus confirms that although partisanship may be a fact of life, it is not a legitimate excuse for purposely injecting population deviations into a redistricting plan.

D. None of the Justifications Proffered by Defendants Is Legitimate

Defendants' principal justification for the deviations in the Plan was that they were necessary to preserve county borders, especially the Queens County border. Indisputable evidence confirmed, however, that fewer county lines could have been split with lower deviations, *see Kilgarlin v. Hill*, 386 U.S. 120, 123 (1967) (rejecting deviations where other plans presented to the court respected county lines but produced substantially smaller deviations), and that the only reason the drafters preserved the Queens County border was that it enabled them to shift as much white population as possible into a vulnerable Republican Bronx district. Tellingly, the district court did not rely upon or even mention this explanation, which was transparently pretextual.

The district court did credit Defendants' claim that the deviations were necessary to avoid incumbent pairings. (J.S.

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[14] *See* 124 S. Ct. at 1785 (plurality opinion of Scalia, J.) (accepting that "partisan gerrymanders [are incompatible] with democratic principles" and that an "*excessive* injection of politics [into redistricting] is *un*lawful"); *id.* at 1798 (Kennedy, J., concurring) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible."); *id.* at 1808 (Stevens, J., dissenting) (when "political considerations . . . disadvantage members of a [political] minority," they "must rest on a neutral predicate"); *id.* at 1816 (Souter, J., dissenting) ("[T]he increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine.").

3a, 28a, 34a). The evidence was uncontradicted, however, that the drafters sought only to avoid pairing upstate or Republican incumbents, and that two sets of downstate Democratic incumbents were gratuitously paired. *See Larios*, 300 F. Supp. 2d at 1347 (any "policy of protecting incumbents" must be "applied in a consistent and neutral way").[15] Coupled with the copious affirmative evidence of a deliberately discriminatory scheme, this pretext evidence makes it even more clear that the district court erred in granting Defendants judgment as a matter of law. *See Abate*, 403 U.S. at 185 (courts must "carefully scrutinize[] state interests offered to justify deviations from population equality"); *Karcher*, 462 U.S. at 741 ("The State must . . . show with some specificity that a particular objective *required* the specific [population] deviations in its plan.") (emphasis supplied).

The district court also credited Defendants' claim that the deviations were necessary to preserve existing districts, but failed to consider whether such an asserted interest in preserving the status quo can be a legitimate justification for a deliberate effort to nullify Census data, particularly on such a broad scale as in this case. The whole point of redistricting following the Census, after all, is to reflect actual population shifts during the preceding decade. Indeed, *Reynolds* condemned the failure to redistrict precisely because that failure perfectly preserved existing districts despite population shifts. Avoiding the consequences of the Census plainly is not a legitimate basis for purposefully deviating from population equality—especially in New York, where preserving prior

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[15] This Court has acknowledged, in the context of *congressional* redistricting, that States may have a legitimate interest in avoiding incumbent pairings because the effect of the prevailing seniority system in Congress is that repeated reelections lead to positions of greater responsibility and power and, in turn, greater ability to be of use to the State in its relations with the federal government. *See Karcher*, 462 U.S. at 740 (1983). But that reasoning does not apply to State legislatures. Although incumbents themselves no doubt have strong interests in self-preservation, it is not at all obvious what legitimate *state* interest is served even by a neutral, evenhanded policy of incumbent protection.

districts is not one of the several redistricting criteria prescribed in the State Constitution. *See* N.Y. CONST. art. III, § 4.[16]

II. The District Court Erred in Sustaining the Majority Leader's Assertion of "Legislative Privilege"

Not only did the district court hold Plaintiffs to an exaggerated burden of proof, but it denied them nearly all opportunity to obtain evidence bearing directly on the central constitutional inquiry: whether the Plan reflects an "honest and good faith effort" to achieve population equality. Instead, the court sustained the magistrate judge's rulings (i) that the Majority Leader was entitled to a qualified privilege along the lines of the deliberative process privilege available to Executive Branch officials; (ii) that neither the Majority Leader's active participation in the litigation, nor his decision to call Burgeson as his "expert" witness, affected his entitlement to invoke the privilege; and (iii) that Plaintiffs' pressing need for discovery did not outweigh Defendants' asserted need for secrecy.

At the outset, this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), casts substantial doubt on whether there is any "legislative privilege" of the sort recognized below. *Gillock* involved an assertion of legislative privilege in federal court by a Tennessee legislator. Although the legislator would have enjoyed a strong legislative privilege under the Tennessee Constitution had he been litigating in state court, this Court held that assertions of legislative privilege in federal court are to be evaluated not under state law, but rather under Rule 501 of the Federal Rules of Evidence, which requires courts to apply federal common law "in light of reason and experience." *Id.* at

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[16] Nor is there any tradition in New York of preserving districts where a region's share of the state population is declining. New York City's share of the state population declined sharply during the 1960s and 1970s, but the subsequent Senate redistrictings in 1972 and 1982 adhered to the Census data and did not depart from population equality to preserve the City's previously apportioned districts. (J.S. 237a-239a).

386.[17] Observing that affording a privilege to State legislators in federal court is neither "indelibly ensconced in our common law" nor "an imperative of federalism," *id.*, the Court held that no such privilege exists, characterizing as "minimal" the "impact" its holding would have "on the exercise of [the] legislative function." *Id.* at 373; *see also In re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987) (applying *Gillock* and holding that State legislators have no legislative privilege in federal court); *Florida Assn. of Rehabilitation Facilities v. Florida Dept. of Health and Rehabilitative Svcs.*, 164 F.R.D. 257 (N.D. Fla. 1995) (same).[18]

Notwithstanding *Gillock*, the magistrate judge held, and the district court affirmed, that the Majority Leader enjoys some form of qualified "legislative privilege"—one that, like the deliberative process privilege available to members of the Executive Branch, required balancing the extent to which disclosure could chill legislative deliberations against Plaintiffs' need to discover the information sought. (J.S. 198a-199a). Rather than actually performing such a balancing analysis, however, the court attached central significance to the fact that the 2002 Senate Plan had been developed in part within LATFOR—a body that includes non-legislators. Because "the fact that LATFOR was constituted in this fashion tends to weaken any claim" that disclosure of its deliberations to non-legislators would be problematic, *id.* 200a, the magistrate judge allowed discovery of documents concerning the "operations" of LATFOR, but shielded the Majority Leader from disclosing any documents that were generated "outside" of LATFOR. *Id.* 202a, 204a-205a. As a practical matter, the Majority Leader was ordered to produce only a small fraction of the contested documents.

There can be no doubt that any appropriate balancing of

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[17] The Speech or Debate Clause of the United States Constitution is inapplicable because it only protects members of Congress, not State legislators. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404 (1979).

[18] "Testimonial exclusionary rules and privileges" are disfavored because they "contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980).

the parties' competing interests would have supported disclosure of the information Plaintiffs sought. The Majority Leader's asserted need to legislate in secret is contradicted by the New York Constitution, which generally requires that the "doors of each house" of its Legislature "shall be kept open." N.Y. CONST. art. III, § 10. The information sought by Plaintiffs, on the other hand, was central to determining a constitutional question of paramount public importance: whether the Legislature discharged its duty to make an "honest and good faith effort" to construct districts of equal population. *See Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (stating, with respect to constitutional claim of minority vote dilution, that "determining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available") (internal quotation omitted); *Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking body" are highly relevant to the question whether the body acted with discriminatory animus). Indeed, legislators and members of their staffs routinely testify in redistricting matters regarding legislative acts and statements designed to show the presence or absence of discriminatory motive. *See Larios*, 300 F. Supp. 2d at 1325-34; *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498, 2516 (2003); *Easley*, 532 U.S. at 254; *Shaw v. Hunt*, 517 U.S. 899, 906 (1996); *Miller v. Johnson*, 515 U.S. 900, 917-18 (1995).

In this case, moreover, the Senate Majority Leader waived any immunity that might otherwise have applied when he removed this lawsuit from state court to federal court. *See Lapides v. Bd. of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002). Not only did the Majority Leader choose not to assert immunity under *Tenney v. Brandhove*, 341 U.S. 367 (1951), but he affirmatively assumed control over the defense of the litigation by voluntarily asserting himself as "lead defendant." Indeed, the Majority Leader even expressly refused Plaintiffs' formal offer to dismiss him from the case with prejudice. We are aware of no case in which any court has ever sustained a

claim of "legislative privilege" where the legislator willingly participated in the litigation rather than asserting immunity. As the Third Circuit recently explained:

> [T]he Legislative Leaders [are not] seeking any kind of wholesale protection from the burden of defending themselves. Instead, the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation . . . yet allow them to refuse to comply with . . . every adverse order. . . . [T]he privilege they propose would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined. In short, they assert a privilege that does not exist. . . . Moreover, every case which they do cite to support this privilege features, in direct contrast to this case, a defendant or target of a subpoena seeking to extricate himself or herself *completely* from various legal entanglements.

Powell v. Ridge, 247 F.3d 520, 525 (3rd Cir. 2001) (emphasis in original). The fact that the Majority Leader made the affirmative choice to participate in this litigation—despite the legislative immunity he could have asserted—extinguishes any privilege that otherwise might have applied.

Finally, and at a bare minimum, the Majority Leader waived legislative privilege by offering Burgeson, the chief architect of the 2002 Senate Plan, as a putative "expert" witness. Instead of proffering any evidence of the *actual* reasons why the Plan contains substantial population deviations, Defendants relied exclusively on Burgeson's "expert" report, which they characterized as an "objective" analysis of the allegedly legitimate redistricting goals they claim the Plan *appeared* to serve. In other words, Defendants relied on the principal drafter of the Plan to offer a sanitized opinion about what the Plan *seems* to do on its face, but then refused to disclose information demonstrating whether his "objective" analysis comported with what he and the other drafters of the Plan

actually did. This was particularly problematic given that Burgeson's experience drafting this Plan and earlier New York Senate plans constituted his sole asserted qualification for providing an expert opinion.

Under Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure, a "party may, through interrogatories or by deposition, *discover facts known* or opinions held by an expert who has been retained or specially employed by another party" (emphasis supplied). The Rules require disclosure of "facts known" by an expert for the simple reason that opinions are based on facts, and the extent and nature of the facts to which an expert is privy goes directly to the ability of that expert to opine in a particular subject area. It is for the same reason that Rule 26(a)(2)(B) requires disclosure, *inter alia*, of "all data or other information considered by the [expert] witness in forming the opinions." Defendants cannot credibly deny that Burgeson considered the "data" and "information" that constitutes his experience in personally drawing the 2002 Senate Plan when forming his opinion about the redistricting objectives the Plan supposedly appears on its face to serve. For all these reasons, the court should have permitted discovery relating to his experience actually drawing the Plan at issue.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court note probable jurisdiction.

Respectfully submitted,

Richard D. Emery *
Eric Hecker
Emery Celli Brinckerhoff & Abady LLP
545 Madison Avenue
New York, New York 10022
(212) 763-5000

David T. Goldberg
99 Hudson Street, 8th Floor
New York, New York 10013

H. Reed Witherby
Smith & Duggan LLP
2 Center Plaza
Boston, Massachusetts 02108

* Counsel of Record

August 2004

APPENDIX

Respectfully submitted,

Richard D. Emery *
Eric Hecker
Emery Celli Brinckerhoff & Abady LLP
545 Madison Avenue
New York, New York 10022
(212) 763-5000

David T. Goldberg
99 Hudson Street, 8th Floor
New York, New York 10013

H. Reed Witherby
Smith & Duggan LLP
2 Center Plaza
Boston, Massachusetts 02108

* Counsel of Record

August 2004

Appendix A

United States District Court
S.D. New York

Eric RODRIGUEZ et al.
v.
George E. PATAKI et al.

Howard T. ALLEN et al.
v.
George E. PATAKI et al.

No. 02 CIV. 618
No. 02 CIV. 3239

March 15, 2004

Before WALKER, Chief Circuit Judge, KOELTL and BERMAN, District Judges.

PER CURIAM:

I. INTRODUCTION

These consolidated actions include constitutional and statutory challenges to the State Senate and congressional redistricting plans enacted by the New York State Legislature in April 2002 (following the 2000 census) and precleared by the United States Department of Justice in June 2002. Seven of the eight counts in the Joint and Consolidated Amended Complaint, dated January 24, 2003 ("Complaint"), pertain to the

2002 New York State Senate redistricting plan ("Senate Plan"), and one count pertains to New York's 2002 congressional redistricting plan ("Congressional Plan"). Two of the eight counts raise constitutional challenges under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1: a one-person, one-vote challenge to the Senate Plan as a whole and a racial gerrymandering challenge to Senate District ("SD") 34. Six counts raise challenges under section 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973(b) (the "VRA"), including challenges by the lead plaintiffs to redistricting in the Bronx, Long Island, and the state as a whole, as well as challenges by plaintiffs-intervenors to SD 31 and Congressional District ("CD") 17.

On November 6, 2003, this three-judge District Court concluded that the plaintiffs had raised no triable issues of material fact with respect to Counts I, II, IV, VI, and VIII of the Complaint and granted summary judgment to the defendants on those claims. We indicated that an opinion explaining the decision would follow. Following trial, the Court has concluded that the plaintiffs have failed also to establish the claims set forth in Counts III, V, and VII by a preponderance of the evidence. Our opinion with respect to those counts on which we granted summary judgment together with our findings of fact and conclusions of law with respect to all counts are detailed below, but some of the overarching considerations that inform our decision are as follows:

First, New York's 2002 redistricting laws are well within the purview and political prerogative of the State Legislature. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.... Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *see also Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498, 2511-12 (2003); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964).

Second, the 2002 Senate Plan reflects traditional districting principles including: maintaining equality of population, preserving the "cores" of existing districts, preventing contests between incumbents, and complying with the requirements of the Voting Rights Act. *See Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1056 (D.Md.1994) (three-judge court); *see generally Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D.Ga.2004) (three-judge court).

Third, the 2002 redistricting continues New York's check and balance in its bicameral Legislature. In the State Assembly, which has been dominated by Democrats since 1974, six seats were gained by Democrats in 2002 and the balance of Democratic to Republican assemblypersons changed from 97/53 to 103/47. In the State Senate, which has been dominated by Republicans since 1966, the balance of Republican to Democratic senators shifted from 36/25 to 38/24, including the post-election change in party affiliation (from Democratic to Republican) of one senator.

Fourth, the Senate Plan reflects less than a 10% deviation in population between any two Senate districts. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983) ("[A]n apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations."). The plaintiffs do not assert that racial discrimination accounts for the population deviation. (*See* Transcript of Oral Argument of Motions for Summary Judgment, dated Nov. 4, 2003, at 65 ("Summ. J. Tr.").) Rather, they argue that the Senate Plan discriminates geographically, favoring underpopulated "upstate" districts over overpopulated "downstate" districts, and that the single Senate seat added by the Legislature in 2002 should have been located south of Putnam County.[1]

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[1] The plaintiffs' definitions of "upstate" and "downstate" are unclear according to Todd A. Breitbart ("Breitbart"), one of the plaintiffs' own proposed fact witnesses and a senior research analyst with the Office of Minority Counsel for the State Senate. (*See* Stip. of Undisputed Facts ("Stip.") ¶ 51 ("In Todd A. Breitbart's August 13, 2003 deposition, he stated 'I am not aware of any generally accepted practice for defining upstate and downstate.'

Fifth, politics surely played a role in redistricting in New York in 2002—as it does in most every jurisdiction. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment.... The reality is that districting inevitably has and is intended to have substantial political consequences."). For example, the Republicans' 62-seat Senate Plan, which became the plan that was enacted, paired four incumbent Democrats to run against each other. The plan initially proposed by the Democrats for a 61-seat Senate paired twenty incumbents, seventeen of whom were Republican. At the same time, the Senate and Assembly joined political forces in developing the State's 2002 Congressional Plan (which was required by the census returns to reflect the loss of two seats from New York's congressional delegation) to pair two Democrats and two Republicans, resulting in the loss of one member from each party.

Sixth, the Senate Plan achieves substantial proportionality of minority representation in the Bronx. "[D]ilution may be found to be absent under the totality of the circumstances when the protected minority groups 'constitute effective voting majorities in a number of districts ... substantially proportional to their share in the population.' " *Session v. Perry*, 298 F. Supp. 2d 451, 477 (E.D.Tex.2004) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1024 (1994)). Four of the five Bronx Senate districts are majority-minority districts, including three Hispanic districts and one black district. Hispanics and blacks combined are 76.1% of the Bronx citizen voting age population ("CVAP") and 77.5% of the voting age population ("VAP").[2]

").) The plaintiffs' definition of downstate appears to exclude Nassau and Suffolk Counties and includes Rockland County and part of Orange County.

[2] The term "black" as used here denotes non-Hispanic census respondents who indicated "black" only or "black" and any other race; "Hispanic" denotes all census respondents indicating "Hispanic"; and "white" denotes non-Hispanic census respondents who indicate "white" and no other race. The term "proportionality," as articulated in *De Grandy*, links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional

Seventh, the relief sought by the plaintiffs in this case cannot be justified under the Voting Rights Act. For example, in Suffolk County, the plaintiffs propose to create a new minority-coalition "influence" district, even though blacks and Hispanics would constitute only 40.2% of the VAP and 33.7% of the CVAP in the proposed district and the plaintiffs concede that the proposed district would not provide minorities with the ability to elect candidates of choice.[3] In Nassau County, the plaintiffs propose to create a new "ability to elect" district by gathering substantially all of the county's black population in one district. Nonetheless, in the proposed Nassau County district, blacks would constitute less than 37% of the VAP and CVAP and, we conclude, would still not have the ability to elect candidates of their choice. The plaintiffs propose to create a fifth majority-minority district in the Bronx by reducing the minority populations in all four majority-minority districts and dismantling the only majority-white district. They argue that the Voting Rights Act requires that this additional majority-minority district be created even though minorities have more than substantially proportionate representation in the Bronx. The claims by the plaintiffs-intervenors similarly seek to create a supermajority Latino district and a Hispanic-black minority-coalition district, respectively, but cannot satisfy the prerequisites for showing vote-dilution under section 2.

In short, the plaintiffs have failed to establish their claims that the 2002 State Senate or congressional redistricting plans violated the Fourteenth Amendment of the United States Constitution or the Voting Rights Act.

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representation clause of § 2, which provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race. *De Grandy*, 512 U.S. at 1014 n.11.

[3] Blacks would constitute 17.5% of the VAP and 18.1% of the CVAP, and Hispanics would constitute 22.7% of the VAP and 15.6% of the CVAP.

II. BACKGROUND

Based upon the 2000 census results, which reflected New York's lower population growth relative to that of other states, the State Legislature was required to reduce the State's congressional seats from 31 to 29. *See* Act of June 5, 2002, 2002 N.Y. Laws 86; *see also* U.S. Const. art. I, § 4; 2 U.S.C. § 2a. The 2000 census figures, which showed population gains in some New York counties and losses in others (*see* Pls.' Ex. ("PX") 6 tbl. 3), also obligated the Legislature to "readjust" State Senate and Assembly districts so that each district would contain, consistent with applicable districting principles, "an equal number of inhabitants, excluding aliens, and be in as compact form as practicable." N.Y. Const. art. III, § 4.

The entity responsible for developing redistricting plans for the New York State Legislature is the State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"), which was initially created in 1978.[4] In connection with the 2002 redistricting, LATFOR began holding public hearings throughout the State, including hearings held in Syracuse, Binghamton, each of the five boroughs of New York City, Suffolk County, Westchester County, Rochester, and Buffalo, in May-July 2001, and received written comments and proposals from the public regarding Senate, Assembly, and congressional districts. During March 2002, LATFOR received additional public comment during a second round of hearings

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[4] LATFOR consists of six members: two co-chairmen, including a member of the Senate (Sen. Dean Skelos) appointed by the President of the Senate and a member of the Assembly (Assemblyman Sam Hoyt) appointed by the Speaker of the Assembly; two other members of the Legislature, including one (currently unfilled) appointed by the minority leader of the Senate and one (Assemblyman Chris Ortloff) appointed by the Minority Leader of the Assembly; and two individuals who are not members of the Legislature, including one (Mark Bonilla, Esq.) appointed by the President of the Senate and one (Dr. Roman Hedges) appointed by the Speaker of the Assembly. (*See* Stip. ¶ 6). Section 83-m of New York's Legislative Law directs LATFOR to "engage in such research studies and other activities as its co-chairmen may deem necessary or appropriate in the preparation and formulation of a reapportionment plan for the next ensuing reapportionment of senate and assembly districts and congressional districts of the state." (Stip.¶ 5.)

throughout the State (Stip.¶ 13), including hearings held in Buffalo, Rochester, Brooklyn, Queens, the Bronx, Manhattan, Suffolk County, and Albany. Despite its efforts, by the end of 2001, LATFOR had not yet proposed plans for the state legislative or congressional districts.

On January 25, 2002, the plaintiffs, who include black, Hispanic, and white New York voters, filed companion lawsuits against various New York State officials, including Governor George E. Pataki, in the New York State Supreme Court, New York County ("*Allen*" case), and in this Court ("*Rodriguez*" case), seeking declaratory and injunctive relief against the use of the State's then-existing congressional and state legislative districts. (Stip. ¶¶ 8-9); *Allen v. Pataki*, No. 101712/02 (N.Y.Sup.Ct.) (Cahn, J.); *Rodriguez v. Pataki*, No. 02-618 (S.D.N.Y. filed Jan. 25, 2002). The lawsuits alleged, among other things, that, "based on the 2000 Census, those districts violate the United States Constitution and the Voting Rights Act of 1965 as amended." (*See Rodriguez*, Compl.¶ 1 (Jan. 25, 2002).)[5] The plaintiffs requested that each court "set a reasonable deadline for state authorities to enact redistricting plans and obtain [United States Department of Justice] pre-clearance thereof" and adopt and promulgate new districts in the event of a failure by the Legislature to act in time for the 2002 elections. (*Id.* at 17.)

The two cases proceeded along parallel tracks until approximately May 20, 2002 when *Allen* was removed to this Court and then consolidated with *Rodriguez*. The cases have been heard by this three-judge Court because of the assertion

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[5] The plaintiffs include Eric Rodriguez et al., and Howard T. Allen et al. and four groups of plaintiffs-intervenors (collectively, "the plaintiffs"). *See infra* note 14. The defendants include Governor Pataki, Lieutenant Governor Mary O. Donohue, Attorney General Eliot Spitzer, Senate Majority Leader Joseph L. Bruno, Assembly Speaker Sheldon Silver, Assembly Minority Leader Charles Nesbitt, Senate Minority Leader David A. Paterson, the Commissioners of the New York State Board of Elections, and defendant-intervenors Anthony Creaney and Thomas Terry (collectively, "the defendants").

of interrelated constitutional and Voting Rights Act claims. *See* 28 U.S.C. § 2284(a); Order at 1, *Rodriguez*, No. 02-618 (RMB), 2002 WL 818086 (Apr. 8, 2002) (granting "plaintiffs' request for the appointment of a three-judge district court pursuant to 28 U.S.C. § 2284(a), which provides that '[a] district court of three judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body'"); *see also Page v. Bartels*, 248 F.3d 175, 190 (3d Cir.2001) ("[B]ecause statutory Voting Rights Act challenges to statewide legislative apportionment are generally inextricably intertwined with constitutional challenges to such apportionment, those claims should be considered a single 'action' within the meaning of § 2284(a).").

Meanwhile, on February 14, 2002, LATFOR publicly released preliminary proposals for new Senate and Assembly districts--but not for congressional districts. (Stip.¶ 10.) The Senate Plan, which was developed and supported by the Republican Senate majority and which was ultimately enacted, proposed to increase the size of the Senate from 61 to 62 seats. It also added three new majority-minority districts within New York City: a majority-Hispanic district principally in Manhattan (with part in the Bronx), a majority-black district in Brooklyn, and a majority-Hispanic district in Queens. The Senate Plan's ideal population for each district is 306,072 persons; its maximum deviation--that is, the difference between the most populated and the least populated districts--is 9.78%; and the average deviation from the ideal district size is 2.22%. (Stip.¶¶ 44-45, 47.) Senate Democrats devised two alternative plans, one of which was a 61-seat plan prepared by the Senate Minority and submitted to LATFOR in late 2001 and early 2002 ("the Senate Minority 61-seat plan") (*see* Aff. of Mark Burgeson, dated Nov. 12, 2003, ¶ 3 ("Burgeson Aff.")[6]), and the other was

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[6] The defendants have relied, in part, upon the direct testimony of Mark Burgeson, assistant to Sen. Skelos (R), Co-Chairman of LATFOR, who worked on New York's redistricting plans during the 1980, 1990, and 2000 districting cycles. Mr. Burgeson testified as a redistricting expert and was "asked to

a 62-seat plan first made public by (then) LATFOR Co-Chairman and Democratic Sen. Richard Dollinger immediately prior to the enactment of the Senate Plan on April 8, 2002 ("Dollinger 62-seat plan").[7] The Dollinger 62-seat plan proposed adding a fifth majority-minority district in the Bronx (44.8% Hispanic VAP; 18.9% black VAP; 27.4% white VAP) (Stip. ¶ 73; Def. Ex. ("DX") 67) and eliminating the majority-white district included in the Senate Plan. At the public hearings in the Bronx both before and after the LATFOR Task Force released its redistricting plan for public comment in February 2002, no speaker had ever suggested the creation of an additional Hispanic district in the Bronx or a majority-Hispanic/black "coalition" district in Bronx/Westchester; and prior to April 8, 2002, no one had ever publicly suggested a fourth Hispanic district. (Stip.¶¶ 72, 151.) The 2002 Assembly Plan ("Assembly Plan") was developed by the Democratic Assembly. It maintains the number of Assembly districts at 150. The Assembly Plan's maximum deviation is 9.43% and its average deviation is 2.67%. (*Id.* ¶¶ 46, 48.) In the Assembly Plan, the seven majority-Hispanic districts in the Bronx have an average Hispanic VAP of approximately 59%. (*Id.* ¶ 158.) In March 2002, Thomas Doty et al. filed a petition in the New York State Supreme Court, Tioga County, challenging the proposed Assembly districts. Justice Herman Cahn of that court ordered that the *Doty* action be consolidated with the *Allen* action, and the issues involved in Doty's application

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provide an objective assessment of the 2002 Senate plan's compliance with various redistricting criteria." (Burgeson Aff. ¶ 2.)

[7] The plaintiffs have also proposed several Senate plans, including a 62-seat plan incorporated in the Amended Complaint ("Plaintiffs' Original Plan"); a 62-seat plan incorporated in the Joint and Consolidated Amended Complaint ("Plaintiffs' Revised Plan"); a 61-seat plan which had been submitted by the plaintiffs to Special Master Frederick B. Lacey ("Plaintiffs' 61-seat plan"); and a 62-seat plan submitted by the plaintiffs to Special Master Lacey ("Plaintiffs' 62-seat plan"). The plaintiffs have also developed an alternative plan called the "Reverse Maximization Plan." The Senate Democrats prepared all redistricting plans presented by the plaintiffs in this litigation. (Stip.¶ 84.)

appear to have been resolved prior to the removal of *Allen* to federal court.[8]

At a public meeting held on April 8, 2002, LATFOR adopted final proposals for Senate and Assembly districts. (*Id.* ¶ 16.) At the same meeting, Sen. Dollinger stated that he was not, in fact, submitting his 62-seat plan as a proposal for the LATFOR Task Force to consider and adopt: "I do not intend to move its adoption. If I can convince you that you should adopt this plan's underlying principles, you will still undoubtedly wish to make many changes. The plan I put before you is a legal benchmark." (DX 133 (Tr. of LATFOR Public Meeting, dated Apr. 8, 2002, at 17).)

Two days later, on April 10, 2002, the Legislature enacted Assembly Bill No. 11014, which incorporated LATFOR's proposed new Senate and Assembly districts. All three Hispanic senators representing Bronx districts (Sens. Olga Mendez (SD 28), Pedro Espada (SD 32), and Efrain Gonzalez (SD 31)) voted in favor of the Senate Plan (*see* DX 135), along with Sen. Guy Velella (SD 34), who is white. Sen. Ruth Hassell-Thompson, the only black senator from the Bronx, did not vote in favor of the Senate Plan but testified before the vote that she "supported the lines that were drawn that would configure her district." (Stip.¶ 107.) On April 22, 2002, the Legislature passed Senate Bill No. 7300, which included certain chapter amendments to the redistricting legislation. Governor Pataki signed Assembly Bill No. 11014 into law (Chapter 35 of the Laws of 2002) on April 22, 2002, and he signed Senate Bill No. 7300 into law on April 24, 2002 (Chapter 38 of the Laws of 2002). (*Id.* ¶¶ 17-19.)

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[8] *See* Letter from David M. Gouldin of Levene, Gouldin & Thompson LLP to Richard M. Berman, U.S.D.J. (Nov. 3, 2003) ("The issues involving [Doty's] application were resolved even before removal and a discontinuance to that effect was signed by our office and most, but not all, of the opposing counsel. No reason was offered by those declining to sign."); *see also* Memo Endorsement, dated Nov. 6, 2003 ("Any remaining claims by or against Thomas Doty are hereby dismissed on consent.").

On April 25, 2002, the plaintiffs amended their complaint to challenge the newly enacted Senate Plan and also to seek judicial intervention with respect to the looming congressional redistricting impasse. (*Id.* ¶ 20.) *See Rodriguez*, Am. Compl. ¶¶ 215, 277-78 (Apr. 25, 2002). On the same day, the *Allen* plaintiffs moved in state court for a preliminary injunction prohibiting the use of the Senate Plan for the 2002 elections and seeking to impose a court-ordered plan in its place. (Stip.¶ 21.) On May 9, 2002, following a hearing, Justice Cahn denied the plaintiffs' application in *Allen*, finding that neither injunctive relief nor an expedited trial was warranted. *See Allen*, Order at 2, 5 (May 9, 2002).

By order dated April 26, 2002, this Court appointed former United States District Judge Frederick B. Lacey as Special Master, pursuant to Fed.R.Civ.P. 53, to assist in developing a redistricting plan dividing New York into 29 congressional districts. *Rodriguez*, 207 F. Supp. 2d 123, 125 (2002) ("[T]he 'eleventh hour' is upon us, if indeed it has not already passed. It is therefore necessary ... to prepare for the possibility that this Court will be required to adopt an appropriate [congressional] redistricting plan."). [16] Following a series of comprehensive public hearings, and after conferring with leading redistricting experts, on May 13, 2002, Special Master Lacey filed his Report and Plan for congressional redistricting with this Court ("Lacey Plan"). On May 20, 2002, Referee Kenneth Bialkin filed a similar congressional redistricting plan in the state court action. *See Rodriguez v. Pataki*, Nos. 02-618 (RMB), 2002 WL 1058054, at *3 (S.D.N.Y. May 24, 2002) (three-judge court). On May 24, 2002, this Court adopted the Lacey Plan and ordered its use for the 2002 congressional elections, stating "Special Master Lacey's Plan meets all applicable legal requirements and ... its immediate adoption is required to ensure a timely and orderly New York State Congressional election process." *Id.* at *4. The

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[16] On April 30, 2002, Justice Cahn appointed Kenneth J. Bialkin, Esq., as Referee "to hear and report, and to submit to [the Supreme Court] a valid reapportionment plan for the Congressional districts of the State of New York ...." *Allen*, Order at 2-3 (May 3, 2002).

Court specifically noted that it was "willing, even eager, to accommodate timely state action and ... open to the possibility of withdrawing the Plan we are adopting if the State were to enact an appropriate and lawful plan of its own that allows for a full, fair, and orderly election process." *Id.* at *8. Shortly thereafter, on June 5, 2002, the Legislature did adopt a congressional redistricting plan of its own and passed Senate Bill No. 7356, which Governor Pataki signed into law the same day (Chapter 86 of the Laws of 2002).[17]

Preclearance

Because several New York counties, namely, New York, Bronx, and Kings (Brooklyn) Counties, are "covered" jurisdictions under section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), the legislature's 2002 Senate, Assembly, and Congressional Plans were each submitted to the United States Department of Justice for "preclearance"[18] (*See, e.g.*, PX 27 at 1 ("The 2002 Senate districts in [the covered] boroughs, as well as those in non-covered jurisdictions, were designed to avoid any retrogression in minority voting strength. By increasing the

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[17] The configuration of CD 17, which is challenged in this litigation, is similar to the CD 17 proposed in the Lacey Plan. (*See* Aff. of C. Daniel Chill in Supp. of Defs.' Mot. for Summ. J. with Regard to the Eighth Cause of Action, dated Oct. 2, 2003, ¶¶ 18-19 ("In light of the Court's determination that the configuration of the 'voting rights' districts within the City of New York in the Lacey plan complied with the Voting Rights Act and the United States Constitution, the Legislature, on June 5, 2002, passed districting legislation which adopted, without change, the district lines in the Court's plan within the City of New York.... [T]he Legislature (as was Special Master Lacey in crafting his plan) was compelled to reach up into the heavily white area of Westchester to find the additional population necessary to satisfy the one/person, one/vote Constitutional mandate in respect to District 17.").)

[18] New York may not change a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" in covered jurisdictions unless the Attorney General of the United States or the United States District Court for the District of Columbia has precleared the change. 42 U.S.C. § 1973c; Jud. Admin., Procedures for the Admin. of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. Part 51 app. (2003). To obtain preclearance, the State must demonstrate that proposed changes "do[ ] not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

number of electable districts without compromising minority electoral opportunities in the pre-existing districts, the 2002 plan clearly *enhances* minority voting strength.").) On June 17, 2002, the Department of Justice precleared the Senate and Assembly Plans, including specifically the increase in Senate districts from 61 to 62. (*See, e.g.*, DX 138.) The Department of Justice precleared the Congressional Plan on June 25, 2002. (Stip.¶ 35.) After the Congressional Plan was precleared, this Court withdrew the Lacey Plan. *See Rodriguez*, 2002 WL 1334733, at *1 (June 25, 2002) (three-judge court).[19]

In November 2002, the first New York elections were held under the new state legislative and congressional redistricting plans. The Democrats had a net gain of six seats in the Assembly, giving them a 103/47 majority. The Republicans had a net gain of one seat in the Senate (in addition to the post-election change to the Republican party of Sen. Mendez), increasing their majority to 38/24. The congressional redistricting, which had paired two incumbent Democrats (Reps. Louise Slaughter and John LaFalce) and two incumbent Republicans (Reps. Benjamin Gilman and Sue Kelly), resulted in the loss of one Democratic congressional seat and one Republican congressional seat after Reps. LaFalce and Gilman each decided to retire rather than run against another incumbent.[20]

The Joint and Consolidated Amended Complaint

On January 24, 2003, the plaintiffs and plaintiffs-intervenors[21] filed a Joint and Consolidated Amended

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[19] On July 25, 2002, this Court denied the plaintiffs' motion to reinstate the Lacey Plan and to reduce the number of signatures required for primary ballot access for the 2002 congressional elections. *Rodriguez v. Pataki*, Nos. 02-618 & 02-3239, 2002 WL 1733676, at *7 (S.D.N.Y. July 25, 2002) (three-judge court).

[20] With the gain of one seat in the November 2002 elections, the Democratic majority in the congressional delegation increased from 19/12 to 19/10.

[21] References to "the plaintiffs" generally include the plaintiffs in the *Allen* and *Rodriguez* cases and the plaintiffs-intervenors. The plaintiffs-intervenors are sometimes referred to separately as follows:

Complaint ("the Complaint") that stated the following causes of action:

(i) The Latino Voting Rights Committee of Metro New York et al. ("LVRC Intervenors");

(ii) Peter K. Lau et al. ("Lau Intervenors");

(iii) Sandra Rivers, Leslie Barbour, et al.("Rivers/ Barbour Intervenors"); and

(iv) Assemblyman David F. Gantt et al. ("Gantt Intervenors").

On April 23, 2003, the Gantt Intervenors asked the Court for permission to withdraw Count IX, which challenged CD 28 (covering western upstate New York, including Rochester and Buffalo). The Court granted the request. (*See* Memo Endorsement, dated Apr, 30, 2003.)

- Count I--the Senate Plan violates the "one person, one vote" requirement of the Fourteenth Amendment (Compl. ¶ 278 ("The Legislature did not make an honest or good-faith effort to construct Senate districts as nearly of equal population as is practicable."));
- Count II--the Senate Plan violates section 2 of the Voting Rights Act (*id.* ¶ 299 ("By failing to draw additional districts in which minority voters would have the opportunity to elect the candidate of their choice, the State Senate Plan dilutes the votes of African-American and Latino voters."));
- Count III--Bronx-based Senate districts violate section 2 of the Voting Rights Act (*id.* ¶ 305 ("Three discrete discriminatory practices resulted in the Legislature's failure to draw a majority-minority district in northern Bronx and southern Westchester counties."));
- Count IV--SD 31 in Manhattan/ Bronx violates section 2 of the Voting Rights Act (*id.* ¶ 314 ("The 31st district in the State Senate Plan has the result and effect of

denying or abridging the right of Latinos to vote ...."));

- Count V--Nassau County Senate districts violate section 2 of the Voting Rights Act (*id.* ¶ 316 ("By fragmenting into multiple districts politically cohesive, compact African-American and Latino communities in Nassau County, who are sufficiently numerous to form a majority-minority district, the State Senate Plan has the result of diluting the voting power of [these] voters ....));
- Count VI--Suffolk County Senate districts violate section 2 of the Voting Rights Act (*id.* ¶ 323 ("By fragmenting into multiple districts the politically cohesive, compact African-American and Latino communities in Suffolk County, who are sufficiently numerous to form a district in which minority voters would have the opportunity to elect the candidate of their choice, the State Senate Plan has the result of diluting the voting power of [these] communities ....));
- Count VII--SD 34 in the Bronx/Westchester is a racial gerrymander in violation of the Fourteenth Amendment (*id.* ¶ 336 ("The predominant purpose of the lines of Senate District 34 was to include non-Hispanic white persons on the basis of race and segregate those non-Hispanic white persons from minority communities in adjoining majority-minority districts.")); and
- Count VIII--CD 17 in the Bronx, Westchester, and Rockland counties violates section 2 of the Voting Rights Act (*id.* ¶ 347 ("As drawn and implemented, the newly enacted Congressional District 17 has the result and effect of diluting the voting strength of Black voters ... in Bronx County and throughout the City of New York.")).[22]

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[22] The Rivers/Barbour intervenors urge us to exercise our discretion to sever this claim because it does not clearly come within the jurisdictional authority afforded this court under 28 U.S.C. § 2284. While the challenge to the

The defendants filed their Answer to the Complaint on July 18, 2003, denying each of the plaintiffs' claims.

On March 7, 2003, the defendants moved to dismiss Counts I, II, VI, VIII, and IX of the Complaint pursuant to Fed.R.Civ.P. 12(b)(6). On June 24, 2003, following extensive briefing and oral argument, the Court denied the motion. *Rodriguez v. Pataki*, 274 F. Supp. 2d 363, 364 (S.D.N.Y.2003) (three-judge court) ("Taking the allegations in the ... Complaint as true as the Court must upon a motion to dismiss, it is appropriate to allow discovery to proceed rather than to resolve these counts at this time. The Court is not here ruling upon the ultimate merits of the parties' respective claims." (citations omitted)). Extensive discovery ensued and was completed on or about September 26, 2003.

Summary Judgment Motion

On October 3, 2003, the defendants moved for summary judgment pursuant to Fed.R.Civ.P. 56 with respect to all pending claims, and the plaintiffs thereafter cross-moved for summary judgment on Count I. In addition to the extensive briefing,[23] the Court heard lengthy oral argument on

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Congressional Plan r[illegible]ining in the Complaint is distinguishable from other counts that challenge the Senate Plan, in the course of this litigation, this three-judge court has heard many claims and arguments within the § 2284 parameters challenging the Congressional Plan. Accordingly, we decline to sever this claim. *See Page v. Bartels*, 248 F.3d 175, 190 (3d Cir.2001); *Armour v. Ohio*, 925 F.2d 987 (6th Cir.1991).

[23] The summary judgment submissions were voluminous and comprehensive. The defendants' papers included: (i) Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defs. Mem."); (ii) Affidavit of C. Daniel Chill in Support of Defendants' Motion for Summary Judgment With Regard to the Eighth Cause of Action, dated Oct. 2, 2003 ("Chill Aff."), with exhibits; (iii) Declaration of John R. Braatz, dated Oct. 3, 2003 ("Braatz Decl."), with exhibits; (iv) Defendants' Statement of Material Facts Pursuant to Local Civil Rule 56.1, dated Oct. 3, 2003 ("Defs. SOF"); and (v) Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Cross Motion, dated Oct. 31, 2003 ("Defs. Reply").

November 4, 2003. On November 6, 2003, the Court granted summary judgment in favor of the defendants with respect to Counts I, II, IV, VI, and VIII of the Complaint, and advised the parties that a full opinion incorporating the counts decided on summary judgment would issue following the trial of Counts III, V, and VII. *Rodriguez*, Nos. 02-618 & 02-3239, 2003 WL 22853022, at *1 (S.D.N.Y. Nov.6, 2003) (three-judge court).

The plaintiffs' papers included: (i) Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Their Cross-Motion for Summary Judgment [corrected version] ("Pls. Mem."); (ii) Declaration of Sarah Netburn, dated Oct. 23, 2003 ("Netburn Decl."), with exhibits; (iii) Plaintiffs' Revised Response to Defendants' Rule 56.1 Statement, attached as Ex. A to Netburn Decl. ("Pls. SOF Response"); (iv) Plaintiffs' Rule 56.1 Counterstatement of Material Facts for Trial, attached as Ex. B to Netburn Decl. ("Pls. SOF"); (v) Affidavit of Joan P. Gibbs, Esq. in Opposition to Defendants' Motion for Summary Judgment as to the Eighth Cause of Action, dated Oct. 23, 2003 ("Gibbs Aff."), with exhibits; (vi) Plaintiffs-Intervenors Council of Black Elected Democrats et al and Sandra Rivers et al Response to Defendants' 56.1 Statement ("Rivers/Barbour Pls. SOF Response"); (vii) Attorney Declaration in Support of Plaintiff-Intervenors Latino Voting Rights Committee of Metro New York et. al. (LVRC) Reply to Defendants' Summary Judgment Motion as to Fourth Cause of Action, dated Oct. 23, 2003 ("Chin Aff."); (viii) Affidavit of Angelo Falcon in Support of Plaintiff-Intervenors' Reply to Defendants' Motion for Summary Judgment on the Fourth Cause of Action, dated Oct. 23, 2003, attached as Ex. 2 to Chin Aff. ("Falcon Aff."), with exhibits; and (ix) Plaintiff-Intervenors Latino Voting Rights Committee of Metro New York et. al. (LVRC) Local Rule 56.1(b) Statement of Disputed Facts in Reply to Defendants' Motion for Summary Judgment on the Fourth Cause of Action, with exhibits ("LVRC SOF Response").

Trial

The trial was held before this Court between November 20 and November 25, 2003. It was preceded by the submission of extensive written filings by all parties which included, among other things, some 273 proposed exhibits; 252 stipulated facts (with subparts); legal memoranda; and proposed findings of fact and conclusions of law. Because no jury was involved, and in order to expedite the trial, the parties also submitted 243 pages of direct testimony by affidavit or declaration in advance of trial.[24]

The plaintiffs' witnesses included: Professor Michael P. McDonald, an expert on voting behavior; Professor Andrew A. Beveridge, an expert on demographics and statistically-based social science data; Professor Ronald Hayduk, an expert on voter participation; Dr. Lisa Handley, an expert on redistricting and voting rights; Professor John Powell, an expert on the socioeconomic status of minorities; State Senator and Minority Leader David A. Paterson; Councilwoman Dorothy L. Goosby, Town of Hempstead (Nassau County); Roger Corbin, Nassau County Legislator; former New York State Assemblywoman Barbara Patton; and Donald Shaffer, a civil rights attorney. The defendants' witnesses included: Professor Harold W. Stanley, an expert on voting behavior and elections; Professor Stephan Thernstrom, an expert on social, political, historical, and economic issues; and Mark Burgeson, an expert on redistricting and the assistant to the (Republican) Co-Chairman of LATFOR.[25]

Following trial, on December 8, 2003, the parties submitted 454 pages of additional proposed findings of fact and conclusions of law; on December 11, 2003, they filed responses

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[24] At the pre-trial conference held on November 19, 2003, the vast majority of exhibits and proposed testimony were admitted without objection. (*See* Nov. 19, 2003 Tr. at 10.) The Court reserved decision with respect to several evidentiary issues, which have been resolved in a Order issued contemporaneously with this decision.

[25] The witnesses' direct testimony submitted in the form of a declaration or affidavit is referenced below as, e.g., "McDonald Decl. ¶ ___."

to each other's post-trial submissions. The parties also submitted letters describing recent redistricting decisions in other jurisdictions.[26] Our decision is based upon a close review of the extensive record.

Legal Standards for Summary Judgment and Trial

With respect to Counts I, II, IV, VI, and VIII, we have applied the standards for granting summary judgment based on the papers submitted to the Court and the record developed with respect to the motions for summary judgment. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). But summary judgment is appropriate "when the nonmovant fails to demonstrate that there is sufficient summary judgment evidence to allow a reasonable fact finder to find in its favor on all essential issues as to which it would bear the burden of proof at trial." *Chen v. City of Houston*, 206 F.3d 502, 505 (5th Cir. 2000) (discussing summary judgment standards in context of racial gerrymandering claim); *see also Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1030 (D. Md.1994) (three-judge court) (explaining that to survive summary judgment dismissal plaintiff must show "there is sufficient evidence from which a reasonable factfinder could find in its favor").

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[26] In particular, the letters addressed *Session v. Perry*, 298 F. Supp. 2d 451 (E.D.Tex.2004) (three-judge court), and *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D.Ga.2004) (three-judge court).

The substantive law governing the case will identify those facts that are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In the context of voting rights cases, a court's summary judgment analysis should account for "the sensitive nature of redistricting and the presumption of good faith" owed to state legislatures. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also id.* at 916-17 (cautioning courts, in context of racial gerrymandering claim, to "recognize these principles, and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation" (citing Fed. R. Civ. P. 56; *Celotex*, 477 U.S. at 327)); *Chen*, 206 F.3d at 505.

With respect to the claims in this case, Count I is a "one person, one vote" challenge under the Equal Protection Clause. For such claims, where the population deviation in the legislature's plan is sufficiently minor and the plan is prima facie constitutional--as, for the reasons explained herein, it is in this case--the plaintiffs must produce evidence that raises a genuine issue of fact as to whether the plan was adopted based on "unconstitutional or irrational" reasons. *Marylanders*, 849 F. Supp. at 1032; *see also Baines v. Masiello*, 288 F. Supp. 2d 376, 386-87 (W.D.N.Y.2003). Counts II, IV, VI, and VIII are vote-dilution claims under section 2 of the Voting Rights Act. On a motion for summary judgment, such claims are viewed in light of the three threshold requirements articulated in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See Marylanders*, 849 F. Supp. at 1045 (explaining that three "*Gingles* preconditions" act as threshold for summary judgment).

With respect to Counts III, V, and VII, which were tried, we have carefully reviewed the extensive record and assessed the demeanor and credibility of the witnesses at trial. Our decision with respect to those counts includes our Findings of Fact and Conclusions of Law as required by Fed.R.Civ.P. 52(a).

The plaintiffs bear the burden of proving their claims by a preponderance of the evidence. *See, e.g., Easley v. Cromartie,* 532 U.S. 234, 258 (2001) (providing standard for burden of proof in racial gerrymandering claim); *Miller,* 515 U.S. at 916; *see also Voinovich v. Quilter,* 507 U.S. 146, 155-56 (1993) (finding district court in error, in section 2 vote-dilution claim, for placing burden of justifying apportionment on State); *id.* at 157 (stating that, under *Gingles,* "plaintiffs claiming vote dilution ... must prove three threshold conditions," and "plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class").

III. ONE-PERSON, ONE-VOTE CLAIM (COUNT I)

A. Legal Standards

The "one person, one vote" principle is grounded in the Equal Protection Clause of the Fourteenth Amendment. *Reynolds v. Sims,* 377 U.S. 533 (1964). It prohibits the dilution of individual voting power by means of state districting plans that allocate legislative seats to districts of unequal populations and thereby diminish the relative voting strength of each voter in overpopulated districts. In *Reynolds,* the Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." The Court required states to "make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Id.* at 577.

While the Supreme Court has held that absolute population equality is required for congressional districts, *Karcher v. Daggett,* 462 U.S. 725, 732-33 (1983), districting plans for state legislative seats require only "substantial" population equality. *See Gaffney v. Cummings,* 412 U.S. 735, 748 (1973). The Court has recognized that minor deviations from absolute population equality may be necessary to permit states to pursue other legitimate and rational state policies. *See Reynolds,* 377 U.S. at 577-81; *see also Mahan v. Howell,* 410 U.S.

315, 321-22 (1973). Particular state policies that justify minor deviations from absolute population equality generally include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher*, 462 U.S. at 740.

Because the promotion of these important state policies will often necessitate "minor deviations" from absolute population equality, the Court has held that such minor deviations, alone, are insufficient to establish a prima facie case of invidious discrimination. *Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993). In *Brown v. Thomson*, 462 U.S. 835, 842 (1983), the Court held that redistricting plans with a maximum population deviation below ten percent fall within the category of minor deviations that are insufficient to establish a prima facie violation of the Equal Protection Clause. "Thus, a redistricting plan with a maximum deviation below ten percent is prima facie constitutional and there is no burden on the State to justify that deviation." *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1031 (D. Md.1994) (three-judge court); *see Holloway v. Hechler*, 817 F. Supp. 617, 623 (S.D. W.Va.1992) (three-judge court), *aff'd mem.*, 507 U.S. 956 (1993); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 668 (N.D.N.Y.) (three-judge court), *aff'd mem.*, 506 U.S. 1017 (1992); *Gorin v. Karpan*, 788 F. Supp. 1199, 1201 (D. Wyo.1992) (three-judge court); *Cosner v. Dalton*, 522 F. Supp. 350, 357 n.11 (E.D. Va.1981) (three-judge court).

Compliance with *Brown*'s "ten percent rule" does not end the inquiry. There is still a question of how the "ten percent rule" dovetails with *Reynolds* and its progeny, which require a "good faith effort" by the state to achieve "as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. For example, a three-judge court in *Hastert v. State Board of Elections*, 777 F. Supp. 634, 645 (N.D. Ill.1991), suggested that "minute population deviations remain legally significant." The court in *Corbett v. Sullivan*, 202 F. Supp.2d 972, 987 n.7 (E.D. Mo. 2002) (citing *Karcher*, 462 U.S. at 738-40), held that "[e]ven deviations smaller than the census margin of error must be the

result of a good faith effort to achieve population equality."

The defendants' summary judgment brief argued, in substance, that the "ten percent rule" effectively creates a "safe harbor" that forecloses all challenges to redistricting plans in which the maximum deviation is below that percentage. Supporters of this per se rule point to the fact that nearly no state districting plan with a maximum deviation below ten percent has ever been struck down by a court as violating population equality. Moreover, the language of some recent decisions seem to support the per se rule. The *Weprin* court, for example, indicated that plaintiffs who fail to demonstrate a maximum population deviation in excess of ten percent cannot survive a motion to dismiss. *See Weprin*, 796 F. Supp. at 668 ("[A]bsent credible evidence that the maximum deviation exceeds 10 percent, plaintiffs fail to establish a prima facie case of discrimination under [the one-person, one-vote] principle sufficient to warrant further analysis by this [c]ourt."). *But see Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 311-12 (E.D.N.Y. 2003) (finding claims where deviation is less than ten percent justiciable if some other discriminatory purpose is shown over and above obvious political motivations); *Licht v. Quattrocchi*, 449 A.2d 887 (R.I. 1982) (striking plan with five-percent deviation).

The plaintiffs concede that if the maximum population deviation between districts in a redistricting plan is under ten percent, the state has no burden to justify that deviation. The plaintiffs argue, however, that they may successfully challenge a plan with a maximum deviation below ten percent if they can prove that the "minor deviation" does not result from the promotion of other legitimate state policies, but rather from an impermissible or irrational purpose. We think that *Brown*, *Mahan*, *Gaffney*, and *Abate v. Mundt*, 403 U.S. 182, 187 (1971), lend support to the proposition that the "ten percent rule" is not meant to protect a state that is systematically disadvantaging groups of voters with no permissible rational justification for the disproportion.

We conclude, with *Marylanders*, 849 F. Supp. at 1032, that

a plan within the "ten percent rule" is not per se immune from judicial review. No decision explicitly adopts the per se rule. *Weprin*--the case that comes closest to stating the rule--did not involve a plaintiff claiming unconstitutional or irrational state policies. *See Weprin*, 796 F. Supp. at 668. Thus, "if the plaintiff can present compelling evidence that the drafters of the plan ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others," a one-person, one-vote action will lie even with deviations below ten percent. *See Legislative Redistricting Cases*, 629 A.2d 646, 657 (1993); *see also Licht*, 449 A.2d at 887 (finding deviation of five percent to violate one-person, one-vote requirement because deviation "negate[d] the effects of reapportionment").

Moreover, in light of recent technological changes, there is a reason not to allow the state systematically to dilute the votes of certain classes of citizens simply because the state is able to keep its discrimination within a ten-percent deviation. The powerful computer programs of today allow states to manipulate districting lines to alter voting patterns within a district with a high degree of precision. Under these circumstances, we see no reason to give a state operating within the ten-percent margin immunity from all review as to whether it is acting irrationally or undertaking invidious discrimination. The benefit of flexibility to pursue legitimate state policies that states receive under the "ten percent rule" since *Brown* carries with it a responsibility not to use the rule to frustrate the very purpose of the decennial census and systematically discriminate against a group of voters.

Appropriate review can be achieved under the burden-shifting regime upheld in *Marylanders* where:

> a plaintiff [can], with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent. To prevail, though, the plaintiffs have the burden of showing that the deviation in the plan results *solely* from the promotion of an

> unconstitutional or irrational state policy. Thus, the plaintiffs ... must demonstrate ... that the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation. *See Karcher*, 462 U.S. at 740-44. In addition, the plaintiff must prove that the minor population deviation is not caused by the promotion of legitimate state policies.

Marylanders, 849 F. Supp. at 1032 (emphasis added).

If the burden on the plaintiffs in minor-deviation cases were anything less than this substantial showing, then the plaintiffs would be able to challenge any minimally deviant redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials and frustrating the purpose of *Brown* 's "ten percent rule."

B. Analysis

The maximum deviation between Senate districts in the Senate Plan is 9.78%, while the average deviation of the Senate districts from the ideal district population is 2.22%.[27] Because the plaintiffs have failed to establish a prima facie case of unconstitutional discrimination under *Brown*, the defendants have no burden to justify the plan's minor deviation. *Marylanders*, 849 F. Supp. at 1033 (citing *Voinovich*, 507 U.S. at 160; *Brown*, 462 U.S. at 842-43).

We denied the defendants' initial motion to dismiss this count of the Complaint, *see Rodriguez v. Pataki*, 274 F. Supp. 2d 363 (S.D.N.Y.2003), to give the plaintiffs an opportunity to

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[27] The deviation percentages are calculated using the following methodology: The deviation of a district is the percent a district's population is above or below the ideal population, where the ideal number is determined by assuming that each district should have perfect population equality. "Maximum deviation" or "total deviation" is determined by adding the deviation of the district with the largest population to the deviation of the district with the smallest population. "Average deviation" is determined by averaging the deviations of all the districts. *See, e.g., Farnum v. Burns*, 561 F. Supp. 83, 87 n.5 (D.R.I. 1983) (three-judge court).

meet their burden to show that the minimal deviation results solely from an unconstitutional or irrational state purpose rather than from other state policies recognized by the Supreme Court to be appropriate reasons for deviations. Such policies, announced in *Karcher*, include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent [r]epresentatives." *Karcher*, 462 U.S. at 740. Following discovery, the defendants moved for summary judgment, arguing that the plaintiffs have failed to raise disputed issues of fact that, if resolved in their favor, could support a finding that they carried their burden. The plaintiffs cross-moved for summary judgment on this count, arguing that they have met their burden with uncontradicted evidence.

The plaintiffs assert that the Senate redistricting scheme impermissibly and arbitrarily discriminates against "downstate" residents (defined by the plaintiffs as Senate Districts 10-38--notably excluding the Long Island-based districts, Senate Districts 1-9) by systematically overpopulating all of those districts and systematically underpopulating all of the "upstate" districts (defined by the plaintiffs as Senate Districts 39-62). These discriminatory actions, the plaintiffs allege, result in a single Senate district being retained by voters located in the "upstate" area when it should have been eliminated and an additional "downstate" district created.[28] The plaintiffs maintain that this qualifies as invidious discrimination because *Reynolds* itself disallowed discrimination against rural as opposed to urban residents of the state and thus made "regional discrimination" actionable.

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[28] The plaintiffs' mathematical argument is as follows: The average overpopulation of the 29 "downstate" districts in the 2002 Senate Plan is +2.37%. The number of people the 2.37% represents would total 68.80% of a single district while the average underpopulation of the 24 "upstate" districts is -2.86%, totaling 68.57% of a district. (*See* Pls. Mem. at 3.) Thus the "downstate" region, the plaintiffs argue, is underrepresented by approximately two-thirds of a Senate seat. The plaintiffs contend that the redistricting plan should have rounded off by eliminating an "upstate" district and creating a "downstate" one.

The plaintiffs also argue, as they must to meet their burden, that the defendants' systematic overpopulation and underpopulation lacked any rational or constitutionally permissible purpose. By implication, the plaintiffs suggest that racial bias may have animated the plan because all fourteen majority-minority Senate districts were overpopulated and are "downstate," where most of the state's minority population lives.[29] Finally, the plaintiffs urge that the defendants made no "honest and good faith effort," as required under *Reynolds*, to achieve real population equality, but rather adhered to the "ten percent rule" (just barely) because they believed it to be a "safe harbor."

It is effectively undisputed that in their redistricting plan the defendants were plainly mindful of the "ten percent rule," as demonstrated by various memoranda of the chief architect of the plan, Mark Burgeson. No invidious purpose can be inferred from such conduct alone; indeed, *Brown* invites adherence to the "ten percent rule." Consistent with *Marylanders* and *Farnum v. Burns*, 561 F. Supp. 83, 93 (D.R.I.1983) (three-judge court), we find that an express objective of staying within a ten-percent deviation while pursuing other legitimate goals provides no support to the plaintiffs' claim of invidious or arbitrary discrimination or of bad faith. *See Marylanders*, 849 F. Supp. at 1034 (reasoning that objective of staying within ten-percent window rather than achieving absolute population equality "merely recognize[s] the flexibility that the State had in order to accommodate other legitimate state policies" and "demonstrates nothing more than the objective of crafting a plan with constitutional population equality").

To be sure, *Vigo County Republican Central Committee v. Vigo County Commissioners*, 834 F. Supp. 1080 (S.D. Ind.1993),

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[29] When pressed at oral argument, counsel for the plaintiffs conceded that this count was not intended to charge defendants with intentional racial discrimination, although they suggested that the population deviation has a discriminatory effect. (*See* Summ. J. Tr. at 65- 66.)

held that merely trying to stay below ten-percent deviation could not be considered good faith. But *Vigo* arose under idiosyncratic facts, where the plan's total deviation when the litigation started was 37%; only to avoid losing in court did the planners consciously try to eliminate pre-existing bad faith by drawing a plan within the ten-percent parameter. *See id.* at 1085-86. The *Vigo* court essentially found that the defendants there did too little too late--a finding inapposite here. In sum, in the case before us, the defendants' conscious use of the "ten percent rule" cannot, without more, support an inference that no legitimate state policies accounted for a minor deviation in a districting plan or that adherence to the "ten percent rule" was a mere pretext for impermissible considerations.

The plaintiffs have not produced evidence of irrational or unconstitutionally discriminatory behavior by the Legislature, notwithstanding their reliance and emphasis upon Burgeson's memorandum of July 20, 2001, which the plaintiffs claim reveals the defendants' intention to discriminate against the "downstate" region. (Netburn Decl., Ex. 39 (Memorandum from Mark Burgeson to Sen. Skelos, dated July 20, 2001).) In that memorandum, Burgeson expresses a preference against increasing the Senate to 63 seats; he suggests that the only place to add a district to a 62-seat plan would be on Long Island to "combine politically undesirable areas." (*Id.* at 1.) He further emphasizes that an extra seat cannot be added "upstate" because those districts are already drawn "*light*, to avoid migration downstate." (*Id.*) The plaintiffs argue vigorously that the memorandum's references to "politically undesirable" areas prove invidious discrimination.

Putting aside the plaintiffs' questionable assumption that Burgeson's motives are a proxy for those of the Legislature, a fair reading of the memorandum reveals many permissible redistricting considerations. The memorandum shows that LATFOR was interested in contiguity, compactness, preserving the cores of existing districts, desiring not to pit incumbents against one another, respecting then-current political subdivisions and county lines, and staying within the ten-

percent-deviation parameter of *Brown*. (*See generally id.*); *cf. Marylanders*, 849 F. Supp. at 1034.[30] Indeed, this contemporaneous memorandum assists the defendants at least as much as it assists the plaintiffs because it plainly invokes the permissible policies that *Karcher* contemplates. Moreover, to the extent that it refers to areas that would be represented by Democrats as "politically undesirable," we cannot understand what invidious discrimination this phrase supposedly signals: there is no political or racial gerrymandering claim embedded in this count, nor is it surprising that a memorandum to the Republican State Senate in control of redistricting would describe a potential Democratic district as comprised of "undesirable" voters. Finally, it was plainly Democrats on

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[30] The three-judge court in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), recently rejected Georgia's redistricting plans for its state legislature. In the course of that decision, *Larios* rejected the State's rationale of incumbency protection, which it found to be "a permissible cause of population deviations *only* when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner." *Id.* at 1338. The Georgia legislature's House and Senate plans violated those principles. The House plan, which included some multimember districts, paired 47 incumbents, 37 of whom were Republicans (50% of the Republican caucus as a whole). *See id.* at 1328- 29. The effect was to ensure that 19 incumbents would not be reelected, and, in the 2002 general elections, 18 Republican incumbents lost their seats. *Id.* Similarly, under Georgia's 56-seat Senate Plan, *see id.* at 1326-27, there were 6 incumbent pairings involving 10 Republicans. *Id.* at 1328-29. Four of the paired Republican incumbents lost their seats. *Id.* In contrast, the 2002 New York State Senate Plan has only two incumbent pairings while the Plaintiffs' Revised Plan produces four incumbent pairings. (*See* Braatz Decl. Ex. 14.) The 2002 Senate Plan thus reflects a legitimate effort to avoid incumbent pairs. While the two pairings both involve a downstate Democrat-Democrat contest, there is no pernicious pattern of Senate Republicans manipulating population deviations in order to manufacture the pairs or oust large numbers of Democrat incumbents. *Cf. Larios*, 300 F. Supp. 2d at 1330-31.

Long Island in Senate Districts 1-9 who were potentially disadvantaged by this decision, not people in the "downstate" region, defined by the plaintiffs as Districts 10- 38. Accordingly, the memorandum does not help the plaintiffs meet their burden; it evinces permissible motives and fails to show that the deviations resulted solely from impermissible considerations.

On the record before us, still other reasons support summary judgment in favor of the defendants apart from the fact that the plaintiffs failed to show that the deviation was not caused by the promotion of court-approved state policies. First and foremost, the plaintiffs only beg the question in repeatedly asserting that the pattern of overpopulation and underpopulation "reflects an illegitimate effort to overrepresent an entire region of the State in order to maintain its ascendancy in the Senate, at the expense of another large region which the 2000 Census data showed had grown much more substantially over the past decade." (Pls. Mem. at 9.) How can we conclude, given the "ten percent rule" we reaffirm today, that the minimal underpopulation of "upstate" districts was driven by regional discrimination rather than other permissible considerations? Just as in the racial context where courts must deal with the overlap of racial identity and partisan identification and still conclude that the districting is racially--and not simply politically--drawn to find an equal protection violation, *see, e.g., Easley v. Cromartie*, 532 U.S. 234 (2001), so in the one-person, one-vote context must the plaintiffs who challenge a plan with less than a ten-percent deviation present some evidence that the districting can be traced to impermissible considerations. In New York State, the traditional correlation between "upstate" districts and Republican political identification (21 out of 24 incumbent Senators upstate are Republican) means that the plaintiffs here needed to proffer more than a mere assertion of a Senate conspiracy for "upstate" ascendancy to meet their burden of showing a violation of the one-person, one-vote principle.[31]

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[31] At no time have plaintiffs asserted a claim of "partisan gerrymandering,"

Second, to the extent that the plaintiffs seek to use the regional aspect of their claim as a proxy for a claim to that a group of voters were systematically disadvantaged, their proposed definitions of "upstate" and "downstate" are self-serving and defective. *Cf. Reynolds*, 377 U.S. at 562 (stating that principle of population equality in districting is aimed to protect citizens and not geographic areas: "Legislators are elected by voters, not farms or cities or economic interests."). The plaintiffs identified the "downstate" region as Districts 10-38, including New York City, Rockland County, most of Westchester County, and two towns in Orange County. (Compl.¶ 106.) They defined upstate as Districts 39-62, including the northern portion of Westchester, most of Orange County, and all of the counties north and west of Westchester and Orange Counties. (*Id.*) We are unable to discern why certain border counties that reach north of New York City--and why only portions of two of those counties--are classified as "downstate" on any basis other than that they are overpopulated. Moreover, the Long Island districts (1-9), while decidedly "downstate" geographically, are conveniently excluded from plaintiffs' "downstate" calculus because they are not overpopulated; they are populated at close to the ideal level. The deposition of the plaintiffs' witness, Todd Breitbart, confirmed that at least he is "not aware of any generally accepted practice for defining upstate and downstate." (Stip.¶ 51.) In sum, the plaintiffs have offered no persuasive basis for embracing their selective definition of state regions, which appears to be tailored to suit their litigation strategy.

Finally, the affidavits on summary judgment establish that if every district were apportioned with perfect equality, the difference in "downstate" representation from what was accorded under the enacted plan would be insignificant. New York City would have been entitled to 26.2 seats as compared with the 26 seats accorded to New York City under the enacted

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as contemplated by *Davis v. Bandemer*, 478 U.S. 109 (1986).

plan (with a seat defined as representing a district controlled or predominantly controlled by city-based voters). *See Marylanders*, 849 F. Supp. at 1035 n.12 (discussing concept of "regional discrimination" and dismissing argument where county "control[led] precisely the number of State Senators that its population indicates it should control").

We consider one final point. The defendants, in response to the plaintiffs' allegation of systematic "downstate" overpopulation, urge us to reassess this allegation in light of population variants: citizen voting age population ("CVAP") and voting age population ("VAP"), instead of total population (which includes ineligible voters). Using these alternative counting methods, both parties stipulate that the New York City districts within the "downstate" districts would then be substantially underpopulated rather than overpopulated. According to the plaintiffs' CVAP figures, the New York City districts in the Senate Plan are underpopulated by 12.0% and "upstate" districts are overpopulated by 15.4%. With respect to registered voters, the weight of one New York City resident's vote, depending on the district of comparison, is worth 29.9% to 63.6% more than an "upstate" citizens vote. (*See* Stip. ¶¶ 16-17, 22.) Although total population figures are the generally accepted basis for redistricting calculations, the practical effect of the Senate Plan on those who actually vote shines a very different light on the plaintiffs' argument that the Senate Plan discriminates against New York City and its voters: the underpopulated "upstate" districts have more eligible citizens and actual voters. The practical effect of the Senate Plan, then, is to dilute the votes of "upstate" residents, not those who reside "downstate."

It does not appear that the New York legislature employed CVAP data in creating its 2002 Senate Plan,[32] and thus the issue

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[32] For this claim, we need not settle the dispute in the parties' briefs about whether the New York Constitution, Article III, § § 4, 5- a, takes a clear position on whether apportionment should proceed strictly on total population measures. The state constitution has no bearing on whether we may analyze the CVAP numbers in assessing the viability of a one-person,

is not whether the court should defer to the state's decision to use a measure other than total population. *See, e.g., Burns v. Richardson*, 384 U.S. 73, 94-96 (1966) (upholding Hawaii's use of registered voter statistics in apportionment because "[t]otal population figures may ... constitute a substantially distorted reflection of the distribution of state citizenry" and because use of registered voter statistics "substantially approximated [the apportionment that] would have appeared had state citizen population been the guide"). This is also not a situation where a state's apportionment plan is within the ten-percent window under one measure but is challenged for being beyond it under a different measure. *See Daly v. Hunt*, 93 F.3d 1212, 1222 (4th Cir. 1996) (involving issue of "the determinative statistic for measuring compliance with the one person, one vote principle" where plan complied with total-population proportionality, but it allegedly "produced an unacceptably high deviation in terms of voting-age population"). In raising the issue of the CVAP distribution in New York State, we are not attempting to promote any particular theory of proportional representation.[33] We simply find that under the circumstances of this case, including the fact that the plan is prima facie constitutional, we do not need to ignore the reality that the overpopulation of New York City districts has not, in fact, diluted the voting strength of "downstate" voters.

Even accepting the plaintiffs' argument that the Senate Plan was designed to draw upstate districts "*light*, to avoid migration [of a Senate seat] downstate" (*see* Netburn Decl. Ex.

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one-vote cause of action under the United States Constitution. In any case, here we refer to the CVAP numbers to ascertain the practical effect of the Senate Plan on actual voters. There is no finding here that the districts were apportioned on that basis.

[33] *See Garza v. County of Los Angeles*, 918 F.2d 763, 780-85 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (distinguishing theory of representational equality based on total population--which protects interests such as access to government--with electoral equality based on CVAP, for example--which protects power of voters in choosing their representatives); *see also Daly*, 93 F.3d at 1222-28 (discussing competing theories and criticizing Judge Kozinski's promotion of one theory--electoral equality--over the other).

39, at 1 (Burgeson Memo, dated July 20, 2001)), we find no constitutional harm. The overall population deviation is within the ten-percent margin of *Brown*, and the plan is prima facie constitutional. The plan promotes the traditional principles of maintaining the core of districts and limiting incumbent pairing. In this case, the overall effect of the deviation is only one seat (actually, two-thirds of a seat) in a 62-seat Senate.[34] Accordingly, we granted the defendants' motion for summary judgment on Count I, the population equality count of the Complaint, and we denied the plaintiffs' cross-motion for summary judgment on the same count. No genuine issues of material fact warranted a trial on this count, and the plaintiffs failed to meet their burden.

IV. VOTING RIGHTS ACT CLAIMS

The Complaint asserts six separate claims of vote dilution pursuant to section 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973, including five State Senate district challenges and one congressional district challenge. The State Senate claims, in the order discussed herein, relate to

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[34] The *Larios* court found the regional disparities in the Georgia plans unconstitutional particularly because there was "no evidence that the population deviations in the plans were driven by the neutral and consistent application of any traditional redistricting principles." *Larios*, 300 F. Supp. 2d at 1349; *see id.* at 1349*53. For example, the court expressly found that "core retention was not a concern in the redistricting process." *Id.* at 1334. Unable to connect the population deviations to a permissible rationale, the court found that "the goal of rural district underpopulation is plainly to overweigh the votes of the region's residents and thereby increase the power of rural voters at the demonstrable expense of voters in other parts of the state." *Id.* at 1346. In this case, the Senate Plan did apply the accepted principle of maintaining the core of districts in both the upstate and downstate regions. Moreover, *Larios* involved the wholesale distortion of district lines throughout the state in order to target and oust members of the minority political party. In this case, the result of the alleged "upstate" favoritism is the loss of just two-thirds of a district for the downstate region. In addition, the practical effect is that downstate districts remain *underpopulated* in terms of CVAP. Maintaining the cores of the "upstate" districts has not been done "at the demonstrable expense of voters" in the downstate region.

Suffolk County (Count VI); Nassau County (Count V); the Bronx and a small portion of Westchester County (Count III); the Senate Plan in its entirety (Count II); and Manhattan and a small portion of the Bronx (Count IV). The congressional claim relates to CD 17, which is located in Bronx, Westchester, and Rockland Counties (Count VIII).

A. Section 2 Legal Standard

Section 2(a) of the Voting Rights Act ("VRA") provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State ... in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or membership in a language minority group]." 42 U.S.C. § 1973(a).[35] Section 2(b) provides that a "denial or abridgement" occurs where,

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State ... are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State ... is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

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[35] Section 1973(a) refers to § 1973b(f)(2), which provides that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State ... to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." Section 1973l (c)(3) defines "language minority group" to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."

§ 1973(b).

To establish a section 2 violation, plaintiffs must first establish by a preponderance of the evidence three threshold conditions articulated in *Thornburg v. Gingles*, 478 U.S. 30 (1986):

(1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district";

(2) that [the minority group] is "politically cohesive"; and

(3) that "the white majority vot[es] sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Growe v. Emison*, 507 U.S. 25, 40 (1993) (quoting *Gingles*, 478 U.S. at 50-51).

With respect to the first *Gingles* precondition, "[t]he reason that a minority group ... must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17. "Because the very concept of vote dilution implies--and, indeed, necessitates--the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' practice." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997); *accord Holder v. Hall*, 512 U.S. 874, 881 (1994).

With respect to the second *Gingles* precondition, "if the minority group is not politically cohesive, it cannot be said that the [challenged structure, practice, or procedure] thwarts distinctive minority group interests." *Gingles*, 478 U.S. at 51. Proof of cohesion in actual elections is required. *See Sanchez v. Colorado*, 97 F.3d 1303, 1312 (10th Cir. 1996); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988); *see also NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1018 (2d Cir. 1995).

With respect to the third *Gingles* precondition, a plaintiff must demonstrate that elections are racially polarized--that "there is a consistent relationship between the race of the voter and the way in which the voter votes," *Gingles*, 478 U.S. at 53 n.21 (internal quotations marks and alterations omitted)--and that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51; *see also id.* at 55-58, 63; *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d Cir. 1993) ("The correct question is not whether white voters demonstrate an unbending or unalterable hostility to whoever may be the minority group's representative of choice, but whether, as a practical matter, the usual result of the bloc voting that exists is the defeat of the minority-preferred candidate.").

The three *Gingles* preconditions are necessary--but not sufficient-- to establish a section 2 violation. "[I]f *Gingles* so clearly identified the three [preconditions] as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994). Rather, a plaintiff asserting vote dilution must also show "that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class." *Voinovich v. Quilter*, 507 U.S. 146, 157 (1993). The relevant inquiry may include the list of factors set forth in the United States Senate Judiciary Report ("Senate Report") accompanying the 1982 bill amending section 2 of the Voting Rights Act, S. Rep. No. 97-147, at 2 (1982), 1982 U.S.C.C.A.N. 177, 177-78 ("Senate Factors"), but this is neither a "comprehensive nor exclusive" list. *Gingles*, 478 U.S. at 44-45; *see* S. Rep. No. 97-147 at 28- 29, 1982 U.S.C.C.A.N. at 206-07 ("[The Senate Factors] often will be the most relevant ones, [but] in some ... cases other factors will

be indicative of the alleged dilution").[36] "[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *De Grandy*, 512 U.S. at 1011.

B. Long Island: Nassau County and Suffolk County (Counts V and VI)

The plaintiffs have brought section 2 vote-dilution claims challenging the Senate Plan with respect to two counties on Long Island: Nassau County and Suffolk County. The plaintiffs contend that in each county, despite the fact that the minority population has been rapidly growing, district lines continue to divide minority communities. Thus, the plaintiffs claim, the districts in Nassau and Suffolk Counties present a classic case of "cracking," where minority voting strength is diluted by dividing the minority population across several districts and thus submerging in each district the minority community in a white majority.

While the black and Hispanic populations have indeed grown significantly on Long Island, particularly during the decade prior to the 2000 Census, in neither Suffolk County nor Nassau County is either minority group large enough itself to

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[36] The Senate Factors include: "the history of voting-related discrimination in the State ...; the extent to which voting in the elections of the State ... is racially polarized; the extent to which the State ... has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.... The [Senate] Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's ... use of the contested practice or structure is tenuous may have probative value." *Gingles*, 478 U.S. at 44-45 (citing S. Rep. No. 97-147, at 28-29, 1982 U.S.C.C.A.N. at 206-07).

form a majority in a Senate district. The plaintiffs proposed two districts, one in Suffolk County and one in Nassau County, as black-Hispanic coalition districts. The first district was Plaintiffs' Proposed District 4 in Suffolk County, which would encompass minority populations from portions of the current SDs 3, 4, and 8.[37] It would have a white VAP of 56.4%, a non-Hispanic black VAP of 17.5%, a Hispanic VAP of 22.7%, and a combined black and Hispanic VAP of 40.2%. *See infra* Table 1. Plaintiffs' Proposed District 8 would include sections from all four Nassau County Senate districts--SDs 6, 7, 8, and 9--and would have a white VAP of 40.7%, a non-Hispanic black VAP of 34.5%, a Hispanic VAP of 19.8%, and a combined black and Hispanic VAP of 54.3%. *Id.* However, the combined black and Hispanic CVAP would be only 47.6% because in those districts almost half of Hispanics of voting age are not citizens. *Id.*

The voting age populations of the Senate districts under the 2002 Senate Plan that comprise Plaintiffs' Proposed Districts 4 and 8 are as follows:

TABLE 1: VOTING AGE POPULATIONS FOR SUFFOLK AND NASSAU COUNTIES[38]

District[39]	Non-Hispanic White VAP	Non-Hispanic Black VAP	Hispanic VAP	Hispanic+ Black VAP[40]

[37] Senate Districts 1 through 9 are located on Long Island. The current SDs 1, 2, 3, and 4 are wholly within Suffolk County, while SDs 5 and 8 are "bridge" districts. SD 5 includes substantial portions of both Nassau and Suffolk Counties, but SD 8 is primarily located in Nassau County and captures only a portion of the Town of Babylon in Suffolk County. SDs 6, 7, and 9 are wholly within Nassau County.

[38] *See* PX 6 tbl. 11 (VAP data for the 2002 Senate Plan), tbl. 16 (VAP data for the Revised Plaintiffs' Plan), tbl. 28 (CVAP data for the Revised Plaintiffs' Plan). For CVAP data for the 2002 Senate Plan, see *id.* tbl. 27.

[39] (S) indicates a Suffolk County district and (N) indicates a Nassau County district.

[40] The Census collects information for people who identify as non-Hispanic black and Hispanic black. The experts in this case generally referred to the

2002 Senate Plan				
SD 3(S)	74.25%	7.09%	15.59%	22.68%
SD 4(S)	76.41%	8.77%	11.92%	20.69%
SD 6(N)	69.04%	15.87%	11.15%	27.02%
SD 7(N)	73.07%	8.36%	9.26%	17.62%
SD 8(N/S)	71.85%	15.06%	10.31%	25.37%
SD 9(N)	81.44%	5.67%	8.48%	14.15%
Suffolk County:				
Proposed District 4[41] (CVAP)	56.38% (63.94%)	17.53% (18.11%)	22.65% (15.61%)	40.19% (33.72%)
Nassau County:				
Proposed District 8[42] (CVAP)	40.65% (48.20%)	34.51% (36.85%)	19.81% (10.76%)	54.32% (47.61%)

non-Hispanic black population statistics when discussing African-Americans or blacks as a distinct minority group.

[41] Comprised of portions of SDs 3, 4, and 8.

[42] Comprised of portions of SDs 6, 7, 8 and 9.

As pleaded, the plaintiffs' Long Island vote-dilution claims face a number of obstacles in their attempt to satisfy the first *Gingles* precondition, which, when read literally, requires that a minority group constitute a majority of the relevant population in a single-member district. *Gingles*, 478 U.S. at 49, ("First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.").

The first problem arises from the fact that the Complaint treated blacks and Hispanics as the equivalent of a single minority group by aggregating the populations of the two minority groups to meet the majority-in-a-district requirement. While the defendants argue that minority groups cannot be aggregated for purposes of a section 2 claim, the Supreme Court has left the question open. *See Growe v. Emison*, 507 U.S. 25, 41 (1993). The Court of Appeals for the Second Circuit, however, has permitted blacks and Hispanics to be combined for the purposes of complying with the first *Gingles* precondition, provided the groups are shown to be politically cohesive. *See Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir.), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994); *see also Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 281 F. Supp. 2d 436, 445 (N.D.N.Y. 2003) (citing *Bridgeport* in stating that Second Circuit law "assumes diverse minority groups can be combined to meet VRA litigation requirements" crafted by *Gingles*). *But see Nixon v. Kent County*, 76 F.3d 1381, 1390-92 (6th Cir. 1996) (en banc) (ruling against aggregating minority groups to meet first *Gingles* condition). In any event, it is plain that to the extent minorities can be aggregated, cohesion between groups cannot be presumed, and the plaintiffs bear the burden of proving such cohesion. *See Growe*, 507 U.S. at 41.

The more substantial legal question for the purposes of the Nassau and Suffolk County claims is whether a vote-dilution claim can succeed if the relevant minority population is not a majority in the plaintiffs' proposed districts. That is, the Nassau and Suffolk County claims raise the issue of whether "coalition"

or "influence" claims are cognizable under the VRA. *Gingles* addressed a claim where "the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure." *Gingles*, 478 U.S. at 46 n.12. The Court declined "to consider whether section 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections." *Id.* As Justice O'Connor pointed out in her *Gingles* concurrence, the plurality opinion left open a question about the nature of the distinction between majority-minority districts and "influence" districts, as well as whether plaintiffs could make a claim where they showed an ability to elect candidates of choice without being a majority of the population. *Id.* at 89 n.1 (O'Connor, J., concurring). Since *Gingles*, the Supreme Court has three times declined to reach the issue of whether vote-dilution claims are viable when the minority group is less than a majority of voters in a proposed district. *See Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993); *Growe*, 507 U.S. at 41 n.5.[43]

Although courts often use the term "influence-dilution" or

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[43] In *Growe*, the Supreme Court applied the *Gingles* preconditions to a single-member districting scheme but, like *Gingles*, did not determine whether plaintiffs can allege "that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results." *Growe*, 507 U.S. at 41 n.5. In *Voinovich*, the Court assumed, *arguendo*, that "influence-dilution" claims are actionable, but it found no racial bloc voting in a challenge to a plan that allegedly "packed" minorities into majority-minority districts. *Voinovich*, 507 U.S. at 158. In *De Grandy*, the Court found no section 2 violation because the minority group was an effective majority in a number of state legislative districts roughly proportional to the minority groups' respective shares in the voting age population. *De Grandy*, 512 U.S. at 1000. The Court did not reach the question of "whether the first *Gingles* condition can be satisfied by proof that a so-called influence district may be created" where members of the minority group are "a minority of the voters, but a potentially influential one." *Id.* at 1008-09.

"influence district" to refer to any district where the minority group would not be a majority of voters, there are two kinds of districts that are conceptually different. A "coalition" or "crossover" district is one where members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to elect representatives of their choice with support from a limited but reliable white crossover vote. *See Hall v. Virginia*, 276 F. Supp. 2d 528, 533-34 & nn.7-10 (E.D. Va. 2003) (defining terms and contrasting "coalition districts" with "influence districts").[44] Coalition or crossover districts are also referred to as "performance" districts, "effective" districts, or "ability to elect" districts. *See id.* at 533 nn.7-9. An "influence" district is where minority voters may not be able to elect a candidate of choice but can play a substantial, although not decisive, role in the electoral process. *See id.* at 534 n.10; *see also Georgia v. Ashcroft*, 539 U.S. 461, 123 S.Ct. 2498, 2513 (2003). Both of these districts are distinct from majority-minority districts, which a literal reading of *Gingles* requires. Most courts have adopted the literal reading of *Gingles* and have rejected claims where the minority group does not constitute a majority of voters in a single-member district. *See Hall*, 276 F. Supp. 2d at 536, 538 (listing cases and stating that

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[44] The parties often used the term "coalition" claim or "coalition district" to refer to a claim where plaintiffs attempt to combine minority groups--for example, blacks and Hispanics--to satisfy the majority-in-a-district requirement of the first *Gingles* precondition. Such claims raise an interpretive issue of whether the VRA was only intended to protect individual minority groups, as well as an evidentiary issue of whether the minority groups are politically cohesive (the second *Gingles* factor). A "coalition" district, as defined in the text above in contrast to "influence" and majority-minority districts, is a distinct concept that raises distinct issues. It raises the interpretive issue of whether a single minority group--blacks, for example--can satisfy the first *Gingles* precondition without being a numerical majority in the district. The core evidentiary issue is whether the minority group can show that, although not a majority, it would have the ability to elect candidates of choice with a limited amount of crossover votes from whites (or voters from other minority groups--Hispanics, for example--that are not cohesive with the relevant minority).

bright-line majority-in-a-district rule is well-established).

To avoid confusion, we will refer to claims involving minority-white coalitions as "crossover" or "ability to elect" claims. At trial, Plaintiffs' Proposed District 8 in Nassau County (Count V) was presented as a "crossover" district that allegedly could provide blacks with the ability to elect candidates of their choice. Other claims in this case involve alleged black-Hispanic coalitions, and we will refer to those as "minority-coalition" claims. *See infra* note 72; *infra* Parts IV.C (Count III, The Bronx), IV.F (Count VIII, The Rivers/Barbour Intervenors).

Plaintiffs' Proposed District 4 in Suffolk County was presented as a pure influence-dilution claim, where no ability for minorities to elect candidates of choice was alleged, even if the black and Hispanic populations are aggregated. For the reasons we will explain, this Court follows the clear majority of courts and therefore rejects the Suffolk County influence-dilution claim. We thus granted summary judgment dismissing Count VI.

In Plaintiffs' Proposed District 8 in Nassau County, blacks and Hispanics, if aggregated, would constitute 54.3% of the VAP and 47.6% of the CVAP--thus straddling the *Gingles* majority threshold. *See supra* Table 1. In Count V of the Complaint, the plaintiffs alleged that blacks and Hispanics should be aggregated and that together they had the ability to elect candidates of their choice in Proposed District 8. (Compl. ¶ 317.) The Court denied summary judgment dismissing Count V of the Complaint both before trial and when the motion was renewed at trial. All parties presented evidence on this claim at trial. At trial, the plaintiffs abandoned their contention that blacks and Hispanics voted cohesively in Nassau County, and they reframed their argument to treat Proposed District 8 as a black-only "ability to elect" district with a 34.5% black VAP. Even assuming, for the sake of argument, that such a crossover claim could be cognizable, we find that the plaintiffs have failed to prove that the Senate Plan violated section 2 of the VRA with respect to the districting scheme in Nassau County.

1. *Suffolk County (Count VI)*

The proposed Suffolk County district would connect a stretch of minority communities from the Nassau/Suffolk border eastward through Islip. (*See* PX 1 map 15.) Plaintiffs' Proposed District 4 would encompass the minority population currently distributed across three Senate districts, including: the minority population in the eastern part in the Town of Islip in SD 3; the minority population in the greater part of the Town of Babylon, which is now in SD 4; and the minority community in the western part of the Town Babylon, which is currently in SD 8, a district that bridges Nassau and Suffolk Counties. (*Compare id.* map 14c (Black and Hispanic Population and Senate Plan 2002), *with id.* map 15 (Black and Hispanic Population and Revised Plaintiffs' Plan).) Proposed District 4 would have a white VAP of 56.4%, a non-Hispanic black VAP of 17.5%, a Hispanic VAP of 22.7%, and a combined black and Hispanic VAP of 40.2%. *See supra* Table 1. The CVAP of blacks and Hispanics combined would be 33.7%. *See id.*

At the argument of the motions for summary judgment, the plaintiffs conceded that they could not satisfy the majority-in-a-district requirement. (*See* Summ. J. Tr. at 44.) The plaintiffs stated that their proposed district in Suffolk County would be an "influence district." They admitted that the case for a violation was weaker for influence districts than for crossover districts under the VRA, but they argued that because there is evidence of intentional discrimination, the influence claim should be allowed. However, we find no basis for concluding that the creation of such a district is required, nor that the Senate Plan violated section 2 of the VRA because it failed to create a minority "influence" district. Moreover, the plaintiffs have failed to present any evidence to support a finding of intentional discrimination.

Although the Supreme Court has left the issue open, federal courts have nearly unanimously interpreted the first *Gingles* precondition strictly and have rejected any claim where the minority group does not constitute a majority of the

relevant population in the proposed district.[45] The Courts of Appeals for the Sixth, Seventh, and Ninth Circuits, have expressly rejected "influence" claims while the Courts of Appeals for the Fifth and Eleventh Circuits have similarly enforced a strict majority-in-a-district requirement. *See Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir. 1998) (announcing that section 2 violations cannot "consist of an impairment of the minority's ability to *influence* the outcome of the election rather than *determine* it"); *Romero v. City of Pomona*, 883 F.2d 1418, 1424 & n.7 (9th Cir. 1989) (refusing to reopen case decided prior to *Gingles* in order to consider ability-to-influence claim, and stating, "We are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district."), *overruled on other grounds, Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988) (describing *Gingles* majority-minority threshold as having "the apparent objective of sharpening section 2's focus," and refusing to consider claim that plaintiffs' ability to influence, rather than win, elections was impaired); *see also Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 851-53 (5th Cir. 1999) (calling *Gingles* factors "a bright line test" requiring proof that minority group "constitute[s] more than 50% of the relevant population in their demonstration district," and denying "ability to elect" claim for

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[45] Although the Supreme Court has left the issue open, VAP and, in particular, CVAP, have been considered the most important statistics in defining the "relevant population" for the majority-in-a-district requirement. *See De Grandy*, 512 U.S. at 1008-09 (leaving open question of which characteristic of minority population should be touchstone for vote-dilution inquiry); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 851-53 (5th Cir. 1999) (stating that CVAP and VAP define "relevant population" and emphasizing reliance on CVAP); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997) (requiring minority group to be majority of CVAP but noting that requirement may not apply where statistics on citizenship rates are not reliable); *France v. Pataki*, 71 F. Supp. 2d 317, 326 (S.D.N.Y. 1999) ("[T]he proper measure of population is the total citizens eligible to register and vote, not the total population.").

district with approximately 48% Hispanic CVAP); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997) (requiring that minority group constitute majority of *citizen* voting age population and rejecting districts where Hispanics had voting age majority but were 41 to 48% of CVAP). *But see Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 979 n.2, 990-91 (1st Cir. 1995) (noting that first *Gingles* factor may need to be reconfigured for influence claims and directing district court to address plaintiffs' influence-dilution claim because "potential influence is relevant to a determination of whether the [minority] group lacks a meaningful opportunity to participate in the electoral system").

Several district courts have also found that *Gingles* prohibits influence-dilution claims. *See, e.g., DeBaca v. County of San Diego*, 794 F. Supp. 990, 996-97 (S.D. Cal. 1992) (rejecting influence claims), *aff'd*, 5 F.3d 535, 1993 WL 379838 (9th Cir.1993); *Turner v. Arkansas*, 784 F. Supp. 553, 568-72 (E.D. Ark. 1991) (three-judge court) (citing *McNeil*, 851 F.2d at 947, and refusing to accept "ability to influence" claim because doing so would undermine *Gingles* preconditions), *aff'd mem.*, 504 U.S. 952 (1992); *Hastert v. State Bd. of Elec.*, 777 F. Supp. 634, 652-54 (N.D. Ill. 1991) (three-judge court) (emphasizing utility of objective rule and refusing to accept plaintiffs' argument for "adoption of a definition of minority influence district that has no statistical bounds as to voter group size"); *cf. Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 672 (N.D.N.Y.) (three-judge court) (declining to resolve issue because plaintiffs could not meet burden of proof on cohesion and racial bloc voting preconditions), *aff'd mem.*, 506 U.S. 1017 (1992).

We agree with the nearly universal opinion of federal courts that section 2 of the VRA does not require the creation of influence districts where minority voters will not be able to elect candidates of choice. Section 2(b) of the VRA protects the ability of minority groups "to participate in the political process and *to elect representatives of their choice*." VRA § 2(b), 42 U.S.C. § 1973(b) (emphasis added). While *Gingles* left open the

possibility of influence claims, Justice Brennan's plurality opinion emphasized: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17; *see also id.* at 48 (requiring plaintiffs to "prove that the use of a [voting practice or procedure] operates to minimize or cancel out their ability to elect their preferred candidates"). If a minority population is too small to elect candidates of choice in a reconfigured district even with the assistance of reliable crossover voters, then it is the size of the population and not the voting practice or procedure that is preventing the minority group from electing representatives of their choice. Dilution of the ability to influence representatives is not an injury cognizable under section 2(b) of the VRA. *See id.* at 50 n.17.

In addition to being at odds with the structure of the statute, the plaintiffs' influence claim, as presented, has no standards and would be judicially unmanageable. "Influence" cannot be clearly defined or statistically proved. *See, e.g., Hastert*, 777 F. Supp. at 652-54 (refusing to open "Pandora's box" by accepting influence claims where influence is poorly defined and has no adjudicable standards). As Justice Souter recognized in *De Grandy*, "some dividing [of minorities] by district lines ... is virtually inevitable." *De Grandy*, 512 U.S. at 1015. Allowing influence claims would open the door for a legal challenge any time a minority population could be shifted to increase the minority population in a nearby district. It would open the door for cases like this one, where the plaintiffs are arguing that the defendants had an affirmative obligation to create a district that has never existed in order to unite all minority communities in a particular region to maximize the proportion of a minority in at least one district.

Moreover, this would be a particularly inopportune case to recognize influence claims under section 2 because there is no evidence that the failure to create a district such as Plaintiffs' Proposed District 4 has diluted meaningful influence for minority voters in Suffolk County. While blacks and Hispanics

combined would be 40.2% of the VAP and 33.7% of the CVAP in Plaintiffs' Proposed District 4, *see supra* Table 1, the plaintiffs cannot prove that blacks and Hispanics vote cohesively in Suffolk County.[46] Even if the groups were cohesive, statistics offered by the plaintiffs' own expert undermine any viable argument that blacks and Hispanics could form a meaningful and influential voting bloc.

The overall pattern of black and Hispanic cohesion was mixed in the local elections analyzed by Dr. McDonald, the plaintiffs' expert. Intergroup cohesion was particularly absent with respect to SD 8, which bridges Suffolk and Nassau Counties. (*See generally id.* at 38-57 (analysis of Suffolk County elections).) The evidence is consistent with the plaintiffs' concession at trial, discussed below, that they could not prove that blacks and Hispanics voted cohesively in neighboring Nassau County elections. With no proven cohesion, Plaintiffs' Proposed District 4 would contain only a 17.5% black VAP and an 18.1% black CVAP. *See supra* Table 1.

The plaintiffs' expert, Dr. Michael McDonald, examined Suffolk County State Senate elections from 1996-2002 and estimated the turnout rates for whites, blacks, and Hispanics in each election for the three districts constituting Plaintiffs' Proposed District 4. (*See* Netburn Decl. Exs. 5, 6 (raw data and summaries of analysis by Dr. McDonald).) Dr. McDonald estimated that whites turned out to vote for those elections at an average estimated rate of 43.0%. (*See id.* Ex. 6 (first Electability Analysis table).) The average estimated turnout

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[46] For example, blacks and Hispanics were not cohesive in the 2000 Democratic primary for CD 2, which was in western Suffolk County and included all of SD 4, all of the Suffolk County portion of SD 8, and most of the minority population in SD 3. (*See* Netburn Decl. Ex. 5 at 44 (McDonald Report).) In that election, the overwhelming majority of Hispanic voters supported two white candidates and a majority of blacks supported an African-American candidate. (*See id.*) Primaries are particularly probative because they eliminate partisanship as a potential reason for blacks and Hispanics voting cohesively. (*See* Aff. of Dr. Harold Stanley ("Stanley Aff.") ¶ 38.)

rate for blacks was 12.0% and for Hispanics it was only 1.4%. (*See id.*) Based on these turnout rates and the demographics for Proposed District 4, whites would, on average, constitute an estimated 90.0% of the actual voters in the proposed district. Blacks would constitute an estimated 7.9% of voters, and Hispanics would constitute only 1.2% of voters. Combined, the minorities would be 9.1% of the voters in elections in the proposed district. (*See* Defs. SOF ¶ 175; Pls. SOF Response ¶ 175 (disputing defendants' calculations only insofar as they used average turnout rates over sixteen elections instead of maximum black and Hispanic turnout rates).) The minority groups would not be able to form a voting bloc large enough to have meaningful influence. This is particularly true because the Republican incumbents for SD 3 and 4--one of which would likely run in the proposed district--have obtained an average of approximately 65% of the vote in the last several elections. (*See* Netburn Decl. Ex. 5 app. 3, at 1, 8, 16-17, 24-25 (reporting election results).)

The plaintiffs argue that the *Gingles* factors should be relaxed to allow the influence claim for Suffolk County because there was intentional discrimination in drawing the district lines. *See Garza v. County of Los Angeles*, 918 F.2d 763, 770-71 (9th Cir. 1990) (relaxing *Gingles* conditions where there was evidence of intentional discrimination but stating that plaintiffs must still prove injury). Although the 1982 Amendments to the VRA directed courts to look at the effects of redistricting, the plaintiffs argue that Congress did not employ an effects test at the expense of prohibiting practices that were intentionally discriminatory.

Even if intentional discrimination were a basis for relaxing the *Gingles* preconditions, the plaintiffs have presented no evidence of intentional discrimination. The thrust of the plaintiffs' argument is not that the drawing of the Senate district lines in Suffolk County was based on intentional discrimination. It is plain that with minor exceptions, the district lines did not change between the 1992 and 2002 redistricting plans. (*Compare* Netburn Decl. Ex. 1 map 14c, *with*

id. map 15.) Indeed, the lines affecting the minority population have not changed since the 1980s districting plan. (*Compare id.* map 13c, *with id.* maps 14c, 15.) The plaintiffs' argument, then, is that the defendants discriminated by refusing to *change* the district lines to unite the minority communities that have grown over time.

The plaintiffs rely again on the memo to Sen. Skelos from Mark Burgeson, head of the Majority Redistricting Office. (*See* Netburn Decl. Ex. 39 (Memorandum from Mark Burgeson to Sen. Skelos, dated July 20, 2001) ("Burgeson Memo"); Summ. J. Tr. at 45-46.) In that memo, discussed earlier with respect to Count I, Burgeson discussed various options for creating a new district that would bring the total number of Senate districts to 63. One option involved creating a majority-minority district by connecting minority areas in Elmont, which is on the west border Nassau County, through Brentwood in the Town of Islip in the middle of Suffolk County. (Burgeson Memo at 1.) This district, Burgeson noted, would be vulnerable to an attack for racial gerrymandering under *Shaw v. Reno* and would also not be useful for Republicans. Burgeson also stated that he received testimony that the minority areas in Hempstead (Nassau County) should be united, and he raised the option of a majority-minority district bridging Nassau and Queens Counties that could accomplish that goal. (*Id.* at 1-2.)

The memo, however, ultimately recommended against a 63-seat plan. Burgeson found that "the *only* reason to go to 63 is to strengthen the Long Island delegation by combining politically undesirable areas in the extra district." (*Id.* at 1.) He explained that there is no other place where it would be possible to strengthen the surrounding districts solely by adding another district. Plainly, the political majority would have been strengthened in existing districts by removing voters not of that party from current districts and placing them in a new district. However, Burgeson concluded that adding another district could have resulted in the loss of a Republican incumbent depending on how it was done, and it probably would not have provided an extra Republican seat. The memo

therefore shows only that Burgeson was considering options that he later rejected, largely for reasons of politics and redistricting demographics.

The plaintiffs deduce an alleged intent to discriminate primarily from two phrases in the memo. (*See* Summ. J. Tr. at 38-42.) Burgeson refers to a possible district uniting minority populations in Nassau County as "carving out politically undesirable areas and at the same time demonstrat[ing] sensitivity to testimony" received at public hearings. (Burgeson Memo at 1.) He later commented that the majority-minority district stretching from the border of Nassau and Queens Counties into Suffolk County would not include most minority areas in Hempstead, and thus those areas "would still need *attention*." (*Id.* at 2.) It is clear from the memo that the districting was politically motivated and that Burgeson was conscious of the impact on minority groups. But consciousness of minority groups is not evidence of intentional discrimination. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("Redistricting legislatures will ... almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.") Indeed, it would be impossible in the face of the Voting Rights Act not to be aware of how redistricting affects minority populations. Most importantly, the memo was directed to a consideration of whether the redistricting committee should have created an additional district under a 63-seat plan--a plan that was never adopted. The memo says nothing about whether the current district lines were drawn or maintained for a discriminatory purpose.

In sum, the plaintiffs have failed to establish that the current Senate district lines in Suffolk County violate section 2 of the VRA. While they have asserted that an "influence" district should be created, the VRA does not require such districts. Moreover, the proposed district is of such slight minority influence that *Gingles*, which left open the possibility, cannot be read to accommodate such a district. The plaintiffs argue that the *Gingles* preconditions should be relaxed in the

face of intentional discrimination, but they have failed to present evidence creating a material issue of fact that there was such discrimination. Summary judgment was therefore granted dismissing the plaintiffs' claim with respect to Suffolk County.

2. *Nassau County (Count V)*

The plaintiffs contend that in Nassau County, the Senate Plan violates section 2 of the VRA because it has "cracked" Nassau County's black population across four Senate districts–SDs 6 through 9–thus diluting the vote of black voters. The plaintiffs initially attempted to argue that blacks and Hispanics should be treated as a single, cohesive minority group. But at trial the plaintiffs conceded that they could not prove that blacks and Hispanics voted cohesively. (*See* Trial Tr. ("Tr.") at 57-60.) The turnout rate for and number of Hispanic voters was too low to make reliable statistical estimates for black and Hispanic cohesion. The plaintiffs thus reframed their claim as based solely on the dilution of black voting strength. Plaintiffs' Proposed District 8 was depicted as an "effective" black district with blacks constituting 34.5% of the VAP and 36.9% of the CVAP. *See infra* Table 2.

TABLE 2: DEMOGRAPHICS OF PLAINTIFFS' PROPOSED DISTRICT 8[47]

Nassau County: Proposed District 8	White	Black	Hispanic	Black + Hispanic
VAP	40.7%	34.5%	19.8%	54.3%
(CVAP)	(48.2%)	(36.9%)	(10.8%)	(47.6%)

(a) *The First Gingles Factor: Majority-in-a-District and the Potential to Elect*

In Plaintiffs' Proposed District 8, black voters would not be a majority of the VAP or CVAP. The plaintiffs thus cannot

[47] (*See* PX 6 tbls. 16, 28.)

satisfy the literal requirements of the first *Gingles* precondition. *See Gingles*, 478 U.S. at 49 ("First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute *a majority* in a single-member district." (emphasis added)).[48] The plaintiffs argue that their claim should be cognizable because black voters in their proposed district would be able to form an effective coalition district where they would have "the *potential* to elect representatives" of their choice with crossover votes from the white majority. *Id.* at 50 n.17. The defendants urge the Court to reject the plaintiffs' Nassau County claim at the threshold because it is now clear that the plaintiffs cannot prove that there is a cohesive minority population that is a majority in the proposed district.

As explained earlier, the Supreme Court has declined to rule on whether "coalition/crossover" or "influence" claims are cognizable under the Voting Rights Act. *See, e.g., Growe*, 507 U.S. at 41 n.5;*Gingles*, 478 U.S. at 46 n.12. Unlike an influence claim such as the one presented for Suffolk County, a crossover claim at least fits the general structure of section 2(b) of the VRA: It alleges that but for the voting standard or practice, the members of the minority group would have the ability to "elect" representatives of their choice. *See* VRA § 2(b), 42 U.S.C. § 1973(b); *Gingles*, 478 U.S. at 48 (explaining that section 2 requires minority members to "prove that the use of a

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[48] The first *Gingles* requirement is often said to involve "numerousness" and "compactness." *See, e.g., De Grandy*, 512 U.S. at 1011. Numerousness involves the majority-in-a-district/potential-to-elect requirement and is the primary focus of this analysis. The "geographic compactness" requirement generally requires plaintiffs to propose a minority district that is sufficiently compact to comply with traditional districting principles. The failure to gerrymander district lines to create a majority-minority district is not an unlawful voting practice, and thus the plaintiffs must show that compact minority district could exist in order to demonstrate a prerequisite for injury. Although Plaintiffs' Proposed District 8 is not an extremely compact district, it is more compact than many districts in the 2002 Senate Plan and the defendants have not challenged the plaintiffs' proposed district on these grounds. (*See* Tr. at 417 (Beveridge).)

[challenged] electoral structure operates to minimize or cancel out their ability to elect their preferred candidates"). In *Voinovich*, the Supreme Court noted that if a crossover claim were allowed, the first *Gingles* factor would have to be modified or eliminated to determine whether the voting practice deprived the protected group of "the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority." *Voinovich*, 507 U.S. at 158 ("[T]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."); *see also De Grandy*, 512 U.S. at 1008 (referring to first *Gingles* condition as requiring "a sufficiently large minority population to elect candidates of its choice"). The plaintiffs thus argue that their vote dilution claim should proceed because blacks in Proposed District 8 would allegedly have the potential to elect candidates of choice.

Just as with "ability to influence" claims, courts have nearly unanimously rejected "ability to elect" claims and have continued to require that the minority group constitute a majority of voters in a sufficiently compact district. *See, e.g., Hall*, 276 F. Supp. 2d at 536, 538 (collecting cases and noting that plaintiffs' coalition claim was distinct from an influence claim, but maintaining "the well-established and objective rule requiring a majority-minority district" under the first *Gingles* precondition); *see also Valdespino*, 168 F.3d at 852-53 (rejecting plaintiffs' argument that to satisfy first *Gingles* condition they need to show only a *potential* to elect); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104 (S.D. Ohio 2003) (three-judge court) (dismissing "influence" claim where minority group was alleged to be large enough "to effectively influence elections, getting their candidate of choice elected"), *aff'd mem.*, — U.S. — -, 124 S.Ct. 574 (2003). Only two federal courts to address the issue specifically have taken a "functional" approach allowing "ability to elect" claims, and the validity of both decisions is in serious doubt. *See Metts v. Murphy*, 347 F.3d 346 (1st Cir.), *opinion withdrawn and reh'g en banc granted*, No. 02-2204, 2003 WL 22434637 (1st Cir. Dec. 3, 2003), 2003 U.S.App. LEXIS

24313; *Armour v. Ohio*, 775 F. Supp. 1044, 1050-52, 1059 & n.19 (N.D. Ohio 1991) (three-judge court) (allowing claim where blacks had ability to elect candidates of choice, but basing its decision in part on finding that *Gingles* did not apply to single-member districts);[49] *see also Martinez v. Bush*, 234 F. Supp. 2d 1275, 1320 n.56, 1320-23 (S.D. Fla. 2002) (three-judge court) (doubting that first *Gingles* factor was intended to be "literal, mathematical requirement").[50]

Courts adopting the majority-in-a-district requirement have emphasized the need for a bright-line rule to act as a gatekeeper. *See, e.g., Valdespino*, 168 F.3d at 852; *Hall*, 276 F. Supp. 2d at 538 (stating that "objective rule" ensures that judges are not required to make "subjective estimate[s] of minority voter influence"). As the Court of Appeals for the Seventh Circuit explained, the majority-in-a-district requirement provides "a choice of clear rules over muddy efforts to discern equity," and it "reins in the almost unbridled discretion that section 2 gives the courts." *McNeil*, 851 F.2d at 942. The bright-line rule effectuates the judicial duty to enforce voting rights while at the same time recognizing, as the Supreme Court instructed, that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe*, 507 U.S. at 34. Without a majority-minority threshold, any redistricting scheme could be challenged whenever disparate

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[49] Because *Armour* based its decision, at least in part, on a finding that *Gingles* did not apply to single-member-district claims, the validity of *Armour* was put in doubt by *Growe v. Emison*, 507 U.S. 25. Moreover, *Armour* has been heavily criticized by other courts. *See, e.g., DeBaca*, 794 F. Supp. at 996-97; *Hastert*, 777 F. Supp. at 652-53.

[50] In *Martinez v. Bush*, the legislature had created a number of "performing minority districts." *Martinez*, 234 F. Supp. 2d at 1322. The parties did not dispute that the *Gingles* conditions were satisfied because there were "groups of black voters in Florida that are sufficiently large and geographically compact to allow the creation of districts that would perform for black candidates of choice." *Id.* at 1321. The dispute was simply over whether "the ostensibly performing districts drawn by the legislature [were] *in fact* likely to perform." *Id.* at 1323. Because the court found that the district would enable black candidates of choice to be elected, it found no vote dilution. *Id.*

minority communities could be pooled together in sufficient numbers to create some potential to elect. *See Parker*, 263 F. Supp. 2d at 1108 (Graham, J., concurring); *see also McNeil*, 851 F.2d at 942 (stating that *Gingles* "shields the courts from meritless claims and ensures that clearly meritorious claims will survive summary judgment"); *Hastert*, 777 F. Supp. at 654.

Both sides in this case have argued that the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461, 123 S.Ct. 2498 (2003), proves their point. In *Ashcroft*, the Supreme Court found that Georgia's redistricting plan did not violate section 5 of the VRA even though it broke up safe majority-minority districts into districts where minority voters would have to form coalitions in order to elect candidates of their choice. The plaintiffs argue that the decision shows that such coalition districts are viable under the VRA. Moreover, the plaintiffs argue, as *Ashcroft* recognized, such districts reflect the fact that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *De Grandy*, 512 U.S. at 1020, *quoted by Ashcroft*, 539 U.S. at ---, 123 S.Ct. at 2512.

However, *Ashcroft* was a section 5 case, and the basis for the Court's decision was that "[s]ection 5 gives States the flexibility to choose one theory of effective representation over the other." *Ashcroft*, 539 U.S. at ---, 123 S.Ct. at 2512. That is, states have the flexibility to choose between safe majority-minority districts, which guarantee minority representation but tend to isolate minorities by removing them from the remaining areas, and "coalitional" districts, which provide less security but enable minority groups to establish a broader political base and potentially affect more elections. *See id.; id.* at 2512-13 (O'Connor, J., concurring). *Ashcroft* recognizes that, at times, voting may not necessarily be so polarized so as to require majority-minority districts. While *Ashcroft* allows crossover districts under section 5, its reasoning does not broaden the power of federal courts under section 2 of the VRA

to require state legislatures to protect or create such "ability to elect" districts. *See Session v. Perry*, 298 F. Supp. 2d 451, 480-81 (E.D. Tex. 2004) (three-judge court).

The *Gingles* opinions are directed at a key question in section 2 claims that is left unanswered by the statute: If a section 2 claim is that minority voting strength is being diluted, "how should undiluted minority strength be measured?" *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring). *Gingles* generally set that norm in terms of the ability to elect candidates of choice in the absence of the challenged structure or practice. *Id.* at 50, n.17 (Brennan, J.). More specifically, the first *Gingles* precondition set the baseline as when the minority group is sufficiently numerous and compact to form a majority in a district. *See id.* at 90-91 (O'Connor, J., concurring); *Hastert*, 777 F. Supp. at 653 (explaining that first *Gingles* factor provides "an objective brightline measure for determining whether an injury has in fact occurred"). In this case, the plaintiffs presented Proposed District 8 as the baseline for measuring vote dilution. With a VAP of 34.5%, the plaintiffs struggled to present evidence that with the right combination of turnout and crossover support, blacks in Plaintiffs' Proposed District 8 would have the potential to elect representatives of their choice. The plaintiffs needed to prove electability not just to show that there was an available remedy, but also to prove that there was an injury, namely, the denial of a cohesive minority's ability to elect a candidate of its choice. A more complete description of Plaintiffs' Proposed District 8 and of its derivation illustrates the hazards of deviating from a requirement of the majority-in-a-district benchmark, and it raises questions about whether Proposed District 8 should qualify as the baseline measure for "undiluted" black voting strength in Nassau County. The theory of the vote-dilution claim in Nassau County identifies cracking as the unlawful voting practice. At the core of the plaintiffs' claim is the contention that Senate redistricting plans have fragmented the black community into four Senate districts, thus dividing and diluting black voting strength. As a descriptive matter, the

black communities in Hempstead, Lakeview, Uniondale, Roosevelt, Freeport, and Baldwin have been bisected by the line dividing SDs 6 and 8. *Cf. Goosby v. Town Bd.*, 180 F.3d 476, 484 (2d Cir. 1999) (stating that black population in Town of Hempstead has been concentrated in those six communities). This is evident from the maps showing the districts and demographics in Nassau County from the 1970s through the current plan. (*See* PX 1 maps 11, 12a, 13a, 14a.)

However, the black population in SDs 6 and 8 alone is not large enough to create an effective Senate district. While SDs 6 and 8 account for around 70% of the black population in the plaintiffs' proposed district, there are only about 76,000 members of the black community in the two districts combined. (*See* DX 171.) Under the enacted and proposed districting schemes, Long Island Senate districts include about 306,000 people. (*Id.*) If the plaintiffs presented a district that united the black voters from Senate Districts 6 and 8 but then drew the rest of its population from predominantly white neighborhoods, the black voting age population would be closer to 25%. In order to reach a 34.5% VAP, the plaintiffs included Westbury and Elmont from SD 7, as well as the areas of North Valley Stream and Valley Stream from SD 9.

On its face, there has not been a history of cracking a minority population across four Senate districts, and traditional redistricting principles do not demand or indicate that the minority communities in all of those areas should be united in one district. Westbury has had a substantial minority population since the 1970s. (*See* PX 1 map 11.) It is located on the southern border of North Hempstead Town, and for the past thirty years it has been included in SD 7, which has encompassed all of North Hempstead Town in every districting plan in evidence. (*See id.* maps 11, 12A, 13A, 14A; Tr. at 308 (Beveridge).) Elmont, on the border of Queens County, is in the Town of Hempstead and is one of the few areas outside the Town of North Hempstead that the legislature has placed in SD 7. (*See* PX 1 maps 11, 12A, 13A, 14A.) While Elmont currently has a significant minority

population, it was almost entirely white as of 1970, when it was included in SD 7. (*See id.* map 11; Tr. at 308 (Beveridge).) Likewise, North Valley Stream and Valley Stream, which have been part of SD 9 since the 1980s redistricting cycle, have a growing minority population that only began to emerge in the 1990s. (*See* PX 1 maps 12A, 13A, 14A.) It is not reasonable to claim that but for an illicit districting practice, the black communities in Westbury, Elmont, North Valley Stream, and Valley Stream would be joined with the black communities in and around Hempstead, Roosevelt, and Freeport.

Rather, the plaintiffs have gathered together in one proposed district substantially all of the black population of Nassau County. (*See* PX 6 tbl. 16 (showing that black population would not be more than three percent in Plaintiffs' Proposed Districts 6, 7, and 9); Tr. at 308-09 (Beveridge).) Even so, the plaintiffs still proffer a district with only 34.5% black VAP, which, as will be seen, is not sufficient to show that black voters have the potential to elect candidates of choice. This is not the use of section 2 of the Voting Rights Act to remedy a prohibited practice of vote dilution but rather a proposed use of section 2 to maximize minority voting strength in Nassau County.[51] As the Supreme Court succinctly stated in *De Grandy*, "Failure to maximize cannot be the measure of § 2." *De Grandy*, 512 U.S. at 1017.

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[51] The plaintiffs' redistricting expert, Dr. Andrew Beveridge testified that the intent of Plaintiffs' Revised Plan, including Proposed District 8, was to produce the maximum minority representation possible while complying with minimum redistricting principles under *Shaw v. Reno*. (Tr. at 346 (Beveridge).) While the plaintiffs argued that Proposed District 8 is a sufficiently compact district that unites communities of interest, Dr. Beveridge testified that only around twelve out of the sixty-two current Senate districts would be less compact than Proposed District 8. (Tr. at 417.) Dr. Beveridge further testified that under colorblind redistricting principles--that is, acting as if everyone in Nassau were the same race--the current Senate districts would not have to be redrawn. (*See* Tr. at 329; *see also* Burgeson Aff. ¶¶ 6-28 (describing neutral districting principles underlying drawing of lines in 2002 Senate Plan).)

It is plain that the plaintiffs' argument is based on the 2002 Senate Plan's failure to change district lines to accommodate a growing minority population. The plaintiffs contend that the legislature diluted minority voting strength because it did not draw a district predominantly along racial lines in order to create a maximum black VAP of 34.5%. (*See* Tr. at 309 (Beveridge) (admitting that plaintiffs' purpose was to create effective black district and that to do so, plaintiffs violated traditional districting principles to include Westbury in Proposed District 8)); *cf. Goosby*, 180 F.3d at 501 n.3 (Leval, J., concurring) (questioning courts' ability to invalidate district where lines were set long ago with no racial motivation and claim has arisen merely because cluster of members of protected class developed around dividing line). Issues about compliance with neutral districting principles and the maximization of minority representation are usually relevant to the totality of circumstances inquiry. In this case, however, those issues reflect a problem with deviating from the strict majority-in-a-district *Gingles* factor. Without the bright-line rule, plaintiffs can argue that minority votes have been diluted merely because it would be possible to patch together disparate minority populations that, if combined, could create a vague potential to elect candidates of choice.

In any event, assuming *arguendo*, as the Supreme Court has done, that the first *Gingles* precondition could be satisfied without the minority group constituting a majority in a compact district, the plaintiffs would still be required to prove as part of the first *Gingles* precondition that the minority group is sufficiently numerous to elect representatives of their choice in that district. The plaintiffs have alleged that blacks in their proposed district would fulfill this requirement. *See Voinovich*, 507 U.S. at 158 (observing that "the first *Gingles* precondition ... would have to be modified" to accommodate crossover claims). When *Growe* assumed that minority-coalition claims were feasible, it found a "higher-than-usual need for the second of the *Gingles* showings," and it noted that proof of cohesion across minority groups was "all the more essential." *Growe*, 507

U.S. at 41. This is because "unless the *Gingles* preconditions are satisfied, there can be neither an injury nor a remedy." *Id.* at 40-41. In this case, to demonstrate an injury based on alleged cracking, if the plaintiffs were to be allowed to proceed without meeting the majority-in-a-district threshold, they would nevertheless have to prove that blacks are sufficiently numerous in their proposed district to elect candidates of choice.

In order to determine whether Plaintiffs' Proposed District 8 fulfills a modified first *Gingles* precondition requiring a "potential to elect," we must first make findings of fact with respect to the turnout rates and voting patterns of whites and blacks. Because these findings address the issue of minority cohesion and racial polarization in Nassau County voting, we will also address the second and third *Gingles* factors in the context of those findings. Having done so, we will then consider the plaintiffs' arguments on electability.

(b) *Racial Polarization and the Second and Third Gingles Preconditions*

The second *Gingles* precondition requires the plaintiffs to show that the minority group is politically cohesive while to satisfy the third *Gingles* precondition, the plaintiffs must demonstrate that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51; *see Goosby v. Town Bd.*, 180 F.3d 476, 491 (2d Cir. 1999). The second and third factors are thus related under the concept of racial polarization. To show that white bloc voting usually defeats the minority-preferred candidate, it is usually necessary to show that minority voters are sufficiently cohesive in preferring certain candidates. It is then necessary to show that whites similarly vote as a bloc, and in doing so, they usually defeat the minority candidate of choice.

To satisfy the second and third *Gingles* preconditions, the plaintiffs relied upon the expert testimony of Dr. Michael McDonald, an assistant professor of government and politics

at George Mason University whose research focuses on voting behavior and research methodology. (Decl. of Dr. Michael McDonald ("McDonald Decl.") ¶ 1.) In assessing voting patterns in this case, Dr. McDonald relied primarily on the Ecological Inference ("EI") method developed by Dr. Gary King and supplemented that analysis with bivariate ecological regression ("BER"), and extreme case analysis (also called homogenous precinct analysis). (*Id.* ¶ 3.) The EI and BER methods are related ways for political scientists to make inferences about the voting behavior of individuals based on aggregate voting data. *See Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 69 (D.D.C. 2002), *vacated on other grounds*, 539 U.S. 461, 123 S.Ct. 2498 (2003).

i) *The Methodology of Dr. McDonald*

Ecological inference generally refers to "the statistical process of drawing inferences about individuals from aggregate data." *See* Bruce M. Clarke & Robert Timothy Reagan, Fed. Judicial Ctr., Redistricting Litigation: An Overview of Legal, Statistical, and Case-Management Issues 53 (2002) (hereinafter "FJC"); *see id.* at 53-64 (providing explanation of various statistical methods used to show racially polarized voting). Ecological regression is one method for drawing such inferences and has been called the "standard technique" most commonly used in voting rights cases. *See Reed v. Town of Babylon*, 914 F. Supp. 843, 851 (E.D.N.Y. 1996); *see also id.* at 851-52 (explaining statistical methods for estimating voter behavior). Bivariate Ecological Regression ("BER") was used by Dr. Benjamin Grofman in *Gingles*. *See Gingles*, 478 U.S. at 52-53 & n.20.

While Dr. McDonald did ecological regression analyses, he primarily relied on a different Ecological Inference method developed in 1997 by Dr. Gary King. *See* FJC at 58-63. Dr. McDonald referred to Dr. King's method simply as "EI." EI has not been tested much in litigation, but it offers the prospect of improving on ecological regression in analyzing racial polarization. In *Ashcroft*, the district court relied on EI calculations and accepted that EI "was generally considered to

be the most accurate method of calculation." *See Ashcroft*, 195 F. Supp. 2d at 70 n.36. The defendants presented the expert testimony of Dr. Harold Stanley, a Professor of American Politics and Political Economy at Southern Methodist University. (Stanley Aff. ¶ 1.) Dr. Stanley asserted that there is an ongoing debate about the reliability of Dr. King's EI methodology, which requires numerous underlying assumptions. (*Id.* ¶¶ 32-35.) He also questioned the reliability of some of Dr. McDonald's estimates, especially with respect to the estimates for Hispanics and the analyses of black-Hispanic cohesion. (*See id.* ¶¶ 14-17.) Because the plaintiffs no longer rely on black-Hispanic cohesion and estimates of Hispanic voting patterns in their Nassau County claim, those criticisms are not material for this count. *But see infra* note 118 and accompanying text.

However, Dr. Stanley reviewed Dr. McDonald's work and found that the analyses were properly performed. The defendants have not submitted conflicting statistical analyses and have instead advanced alternative interpretations of the evidence provided by Dr. McDonald. Dr. Lisa Handley, another expert for the plaintiffs, confirmed that Dr. McDonald's analyses were performed correctly. (Decl. of Dr. Lisa Handley ("Handley Decl.") ¶ 3.) We will therefore accept the statistical analyses of the election results to which all parties have agreed.

Dr. McDonald's analysis was directed at identifying racial polarization, which is loosely defined as when whites and the relevant minority group have different preferred candidates or "candidates of choice." A minority-preferred candidate generally is the candidate that receives the most votes from the relevant minority group. Dr. McDonald, however, adopted a more rigorous standard for identifying elections as racially polarized based on his standard for judging whether the relevant minority group is "politically cohesive." *See Gingles*, 478 U.S. at 51 (second *Gingles* precondition). Dr. McDonald defined cohesion as occurring in an election when 60% or more of the voters of a group vote for the same candidate. (McDonald Decl. ¶ 8.) In adopting the 60% threshold for

cohesion, Dr. McDonald defined racial bloc voting as occurring where at least 60% of a minority group's voters prefer one candidate and at least 60% of white voters prefer a different candidate. For purposes of the Nassau County claim, Dr. McDonald characterized an election as racially polarized only where blacks and whites cohesively supported different candidates of choice.[52]

ii) *Elections Analyzed*

To determine whether racial polarization occurred in Nassau County, Dr. McDonald analyzed sixteen State Senate elections: the 1996, 1998, 2000, and 2002 elections for SDs 6, 7, 8, and 9. Those elections are referred to as "endogenous" because they occurred in the jurisdiction at issue and for the office at issue. Of those sixteen endogenous elections, four involved minority candidates. "Exogenous" elections cover the jurisdictions or geographic areas at issue but are statewide or local elections for offices not at issue. *See Cano v. Davis*, 211 F. Supp. 2d 1208, 1235 n.29 (C.D. Cal. 2002) (providing definition of endogenous and exogenous elections). As acknowledged by all experts in the case, endogenous elections are the most probative elections for determining whether minority groups are politically cohesive and for determining whether racial bloc voting by whites usually defeats the minority-preferred candidate for the office in issue. (*See* McDonald Decl. ¶ 5.) While Dr. McDonald noted that endogenous elections featuring a minority candidate are the most probative, he testified that endogenous elections without minority candidates are also important and cannot be ignored. (*Id.* ¶ 6.) The Court of Appeals for the Second Circuit has confirmed that in addition to considering cases where white bloc voting defeats a minority candidate, courts must also consider elections where white bloc

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[52] For the purposes of this claim regarding Nassau County, the black-preferred candidate is always a cohesively supported black-preferred candidate. The distinction between a preferred candidate and a cohesively preferred candidate arises with respect to Count III involving the Bronx, and Count IV involving the LVRC intervenors.

voting defeats a white candidate cohesively supported by the relevant minority group. *See NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015-16 (2d Cir. 1995).

In addition to the sixteen endogenous elections, Dr. McDonald analyzed ten exogenous statewide general elections and reported estimated voting statistics for each of the four Senate districts for each statewide election. For Nassau County, there were no primary elections for State Senate during the period studied. Dr. McDonald did analyze the exogenous 1998 Democratic primary for Lieutenant Governor because a minority candidate was involved. He also reported findings for the 1988 Democratic presidential primary, which included Jesse Jackson. Neither primary election is probative for the purposes of the Nassau County claim.[53]

The presidential primary with Jesse Jackson occurred in 1988, which is outside of the 1996-2002 range analyzed by Dr. McDonald. Dr. McDonald acknowledged that the primary is too distant to reflect current polarization in Nassau County because, among other things, the demographics and number of voters in the area has changed. Moreover, Dr. McDonald did not analyze other out-of-range primaries with black candidates, such as a 1994 primary with Al Sharpton. (*See* Tr. at 113-14.) And he agreed that it is difficult to extrapolate much from this one election that took place fifteen years ago. (*See* Tr. at 121.)

In summary form, the cohesion and white bloc voting results for the sixteen endogenous elections analyzed are as follows:

TABLE 3: SIXTEEN ENDOGENOUS ELECTIONS IN NASSAU COUNTY[54]

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[53] In the 1998 Democratic primary for Lieutenant Governor, a black candidate, Charles King, was not cohesively supported by black voters in Nassau County and lost the nomination. The defendants attempted to use this primary to argue that white voters in Nassau County do not vote as a bloc against minority candidates. For the reasons explained *infra* note 59, this primary does not support the defendants' claims about racially polarized voting in Nassau County.

[54] All of Dr. McDonald's election analyses can be found in DX 146. This Table

Election[55]	Black Candidates[56]	White Bloc Voting Cohesion	Result for BPC[57]	Source Page[58]
2002 SD 6 Hannon/ St. George *	Yes	Yes	Defeated	2
2002 SD 7 Balboni/ Murray *	Yes	Yes	Defeated	3
2002 SD 8 Fuschilllo/ Dash *	Yes	Yes	Defeated	4
2002 SD 9 Skelos/ Glassberg *	Yes	Yes	Defeated	5
2000 SD 6 Hannon/ Keefe *	Yes	Yes	Defeated	9
2000 SD 7 Balboni/ Brooks *	Yes	Yes	Defeated	10
2000 SD 8 Fuschillo/ Santos *	Yes	Yes	Defeated	11
2000 SD 9 Skelos/ Oppenheimer	Yes	Yes	Defeated	12
1998 SD 6 Hannon/	Yes	Yes	Defeated	18

is a simplified and reorganized version of the Master Table of Racial Bloc Voting Analyses, which is in the beginning of that report. A "corrected" version of that table is produced at DX 148, but none of the corrections are relevant for this analysis of Nassau County.

[55] Elections in bold include a minority candidate. St. George, Dash, and McKnight are all black while Santos is Hispanic.

[56] An asterisk (*) reflects the black-preferred candidate.

[57] "BPC" refers to the black-preferred candidate.

[58] The source page refers to the page for the date for the individual election analyses as numbered in DX 146.

Macagone *				
1998 SD 7 Balboni/ Brooks *	Yes	Yes	Defeated	19
1998 SD 8 Fuschillo/ Hagan *	Yes	Yes	Defeated	20
1998 SD 9 Skelos/ Waterman *	Yes	Yes	Defeated	21
1996 SD 6 Hannon/ Langberg *	Yes	Yes	Defeated	26
1996 SD 7 Tully/ Nachbar *	Yes	Yes	Defeated	27
1996 SD 8 Levy/ McNight *	Yes	Yes	Defeated	28
1996 SD 9 Skelos/ Miller *	Yes	Yes	Defeated	29

In the sixteen endogenous State Senate elections, whites voted as a bloc (60% or more in favor of the same candidate) in all sixteen elections and in all sixteen elections the black-preferred candidate was defeated. *See supra* Table 3. On average, an estimated 94.2% of blacks voted for the black-preferred candidate. (*See* DX 149.) Dr. McDonald also examined the rate of white crossover support and found, on average, that an estimated 30.4% of white voters supported the black-preferred candidate. (*See id.*) Dr. McDonald thus deduced that whites voted as a bloc at an average rate of 69.6% against the black-preferred candidate.

Of the sixteen State Senate elections, four included minority candidates.[59] The results for those four elections were

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[59] Three of the four minority-white elections involved black candidates while one involved a Hispanic candidate. Although the plaintiffs no longer base their claim on black and Hispanic cohesion, evidence of white bloc voting against minorities in general is still probative. At any rate, the parties have included the white-Hispanic election in the count of endogenous elections with minority candidates.

as follows:

TABLE 4: ENDOGENOUS ELECTIONS WITH MINORITY CANDIDATES

Election	Candidates/ Results	Black Support for Minority Candidate	White Support for Minority Candidate
2002 SD 6	Hannon (R) (White) 61.1% St. George (D) (Black) 35.1%	96.1%	23.9%
2002 SD 8	Fuschillo (R) (White) 67.9% Dash (D) (Black) 32.1%	94.0%	21.1%
2000 SD 8	Fuschillo (R) (White) 57.4% Santos (D) (Hispanic) 42.6%	95.7%	31.5%
1996 SD 8	Levy (R) (White) 66.2% McNight (D) (Black) 33.5%	97.4%	24.7%

(*See* DX 147.) In these four elections, whites voted as a bloc against the minority candidate at an average estimated rate of 74.7%. However, it should be noted that the 2002 elections occurred after this litigation was begun, and there is some evidence that those candidates ran in part to establish a litigation track record. (Tr. at 79-80); *see Gingles*, 478 U.S. at 76 (noting that elections conducted after lawsuit was filed may involve special considerations).

Voting patterns in the ten exogenous statewide general elections in Nassau County were more mixed. They are as follows:

TABLE 5: TEN STATEWIDE GENERAL ELECTIONS[60]

Election	Black Cohesive Candidates	White Bloc Voting[61]	Result for BPC[62]	Source Page
2002 Governor	Pataki/ McCall[63]	Yes	Yes	"Defeated" 55-58
2002 Att'y General	Spitzer*/ Irrizary	Yes	No	"Won" 63-66

[60] This table is based on the Master Table and the individual election analyses in DX 146. A corrected version of the Master Table is produced at DX 148.

[61] Dr. McDonald analyzed the statewide elections separately for each Senate district, generating four contest results in Nassau County for each election. For each election, the result as to black cohesion was the same in all four districts, and the result as to white bloc voting was usually the same across the districts. Thus a "Yes" or "No" reflects the result for all four Senate districts unless otherwise specified.

[62] "Defeated" or "won" refers to whether the BPC received fewer or more votes than the white-preferred candidate within the districts. For each election, the result for the BPC was the same across all four districts.

[63] An asterisk (*) reflects the black-preferred candidate. Elections in bold include a minority candidate. St. George, Dash, and McNight are all black while Santos is Hispanic.

2002 Comptroller	Faso / Ilevesi*	Yes	2/4 Yes (SD 6,8)[64]	Defeated	86-89
2000 U.S. President	Bush / Gore*	Yes	No	Won	94-97
2000 U.S. Senate	Clinton*/ Lazio	Yes	Yes	Defeated	102-05
2000 U.S. Senate	Schumer*/ D'Amato	Yes	2/4 Yes (SD, 6,8)	Defeated	110-13
1998 Governor	Pataki/ Vallone*	Yes	Yes	Defeated	117-20
1998 Att'y General	Spitzer*/ Vacco	Yes	2/4 Yes (SD 6,8)[65]	Defeated	125-28
1998 Comptroller	McCall*/ Blakeman	Yes	No	Won	71-74
1996 U.S. President	Clinton*/ Dole	Yes	No	Won	133-36

Six out of the ten statewide exogenous elections, therefore,

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[64] "2/4 Yes (SD 6, 8)" reflects that white bloc voting was found in SDs 6 and 8 but not SDs 7 and 9.

For the 2002 Comptroller election, the Master Table reports no racial polarization in all four Senate districts. However, the individual contest results show that Hevesi's rate of support from white voters was: 35.0% for SD 6; 42.% for SD 7; 35.7 % for SD 8, and 44.7% for SD 9. (DX 146 at 86-89.) Thus in SDs 6 and 8 there was over 60% white bloc voting against the black-preferred candidate. The standard error was not significant enough in any district to alter the conclusions about polarization.

[65] The Master Table (DX 148) indicates that there was racially polarized voting in SD 9 for the 1998 Attorney General election, but the white crossover rate for that district was 42.1%. (*See* DX 146 at 128.)

showed signs of racial polarization. In three of those six elections, only two out of four Senate districts were racially polarized. However, in all three elections, the two polarized districts were SDs 6 and 8, which, when combined, constitute around 70% of the black population in Proposed District 8. (*See* DX 171.)

The exogenous elections with minority candidates were limited in number and produced ambiguous results. For example, Carl McCall, who is black, easily won the election for Comptroller in 1998, and there was no racial polarization. But in 2002 when he ran against the incumbent for Governor, the top leadership position in the state, he was resoundingly defeated in an election with the highest degree of white bloc voting recorded for all of the Nassau County contests. (*See* DX 151 (showing that white voters in the four Nassau Senate districts supported McCall at rates of 14.2%, 20.2%, 15.1%, and 18.7%).) The 2002 Attorney General election matched Spitzer, a white Democrat against Irizarry, a Hispanic Republican challenger. While there was no white bloc voting in that race, a statewide election with a Hispanic Republican says little about Nassau County voters' reactions to black and black-preferred candidates in State Senate elections.[66]

iii) *The Second Gingles Precondition: Cohesion*

With respect to the second *Gingles* factor, the plaintiffs conceded during the trial that they could not prove cohesion between blacks and Hispanics. (*See* Tr. at 57-60.) It is

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[66] A third statewide exogenous election with a minority candidate was the Democratic primary for Lieutenant Governor in 1998, which included a black candidate, Charles King. King was not cohesively supported by black voters, and the primary did not show signs of racial polarization. (*See* DX 148; *see also* DX 146 at 79-82.) Turnout was very low, however, and the primary was the only Nassau County election without black cohesion. (*See* DX 150 (showing turnout to be under 4% for both whites and blacks).) Compared to the clear results found in the endogenous elections both with and without minority candidates, this primary election is not probative for evaluating racial polarization in Nassau County.

undisputed, however, that blacks vote cohesively in Nassau County. Blacks voted cohesively for the same candidate in all sixteen State Senate elections analyzed. *See supra* Table 3. On average, in those elections an estimated 94.2% of blacks backed the same candidate. (DX 149.) The pattern of black cohesion in exogenous elections was equally clear. *See supra* Table 5.

iv) *The Third Gingles Precondition: White Bloc Voting Sufficient Usually to Defeat the Black Candidate of Choice*

All parties agreed that endogenous elections are the most probative, and the pattern in the endogenous elections is clear. As a purely descriptive matter, in every Nassau County State Senate election over the past eight years, blacks have voted cohesively as a bloc for one candidate, whites have voted cohesively as a bloc for the other candidate, and the black-preferred candidate has lost. (*See supra* Table 2.) It is true, however, that the results of the sixteen endogenous State Senate elections can be described equally by the fact that in each of the State Senate elections, the Republican candidate, who was almost always the incumbent, won the election, and the majority of black voters supported the losing Democratic challenger.

The defendants' expert, Dr. Stanley, did not challenge the voting patterns but argued that the cause of the voting patterns is not race. Dr. Stanley claimed that "Dr. McDonald's analyses establish that any divergence between white and minority voters ... is better correlated with partisanship than race." (Stanley Aff. ¶ 39.) The plaintiffs' evidence, Dr. Stanley contends, "essentially consists of the fact that whites in Senate elections supported well-entrenched Republican incumbents who defeated all challengers, white or minority, and the fact that Governor Pataki, another popular incumbent who was easily reelected, defeated Carl McCall in the 2002 gubernatorial election. The Senate election contests reveal no race-based disadvantage since the incumbents defeated all opponents of any race or ethnicity." (*Id.* ¶ 45.)

The thrust of the defendants' argument is that the

plaintiffs have not established the third *Gingles* precondition because they have not shown that the voting behavior in the four Senate districts in Nassau County is correlated with race rather than partisanship. They argue that the voting patterns in the Senate districts simply reflect partisan voting with blacks supporting the Democratic challenger who consistently loses to the Republican, usually incumbent, candidate. They essentially argue that it is the plaintiffs' obligation to establish the three *Gingles* preconditions and that the third condition requires not simply white bloc voting that usually defeats the minority preferred candidate, but "legally significant" white bloc voting correlated with race rather than partisanship. *See Gingles*, 478 U.S. at 56 ("[T]he question of whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices .... And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting."). The plaintiffs respond that the third *Gingles* precondition does not require the plaintiffs to exclude partisanship as a cause of the voting patterns at issue and that inquiries into partisanship should be considered as part of the totality of the circumstances inquiry after the *Gingles* preconditions have been satisfied.

The Court of Appeals for the Second Circuit considered the issue of partisanship in connection with the *Gingles* factors in *Goosby v. Town Board*, 180 F.3d at 491. In *Goosby*, the plaintiffs challenged the practice of using at-large voting to elect the members of the Town Board of Hempstead, and the dispute centered on whether *legally significant* racial bloc voting usually defeated the minority-preferred candidate. Dr. Andrew Beveridge and Dr. McDonald testified for the plaintiffs. *Id.* at 488-89. On behalf of the defendants, Dr. Stanley testified that the patterns of racial polarization were better explained by partisanship than racial animus: a majority of voters in Hempstead were white Republicans while blacks overwhelmingly voted for the Democrat who lost on partisan

grounds. *Id.*

In *Goosby*, the Court of Appeals accepted the plaintiffs' arguments and agreed with the Court of Appeals for the Fourth Circuit that it was necessary "to consider the political partisanship argument under the 'totality of the circumstances' analysis rather than as part of the third *Gingles* precondition." *Goosby*, 180 F.3d at 493; *see Lewis v. Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996). This approach has also been adopted by the Courts of Appeals for the First, Seventh, and Eleventh Circuits, although it has been rejected by the Court of Appeals for the Fifth Circuit. *Compare Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *and Nipper v. Smith*, 39 F.3d 1494, 1524-25 (11th Cir. 1994); *with League of United Latin Am. Citizens v. Clements ("LULAC")*, 999 F.2d 831, 891-92 (5th Cir. 1993) (en banc) (finding that plaintiffs had not satisfied third *Gingles* precondition because "partisan affiliation, not race, caused the defeat of the minority-preferred candidate"). The Court of Appeals for the Sixth Circuit in *Clarke v. Cincinnati* declined to consider whether the third *Gingles* precondition requires that "minority-preferred candidates' lack of success is 'somehow tied to race.'" *Clarke v. Cincinnati*, 40 F.3d 807, 813 n.2 (6th Cir. 1994) (quoting *LULAC*, 999 F.2d at 850). But *Clarke* did reject the contention that the third *Gingles* factor involves a "colorblind approach to the white bloc voting issue." *Id.* at 812.

Goosby is, of course, controlling. The raw statistics establish that in the sixteen endogenous Senate elections, the black-preferred candidate was usually defeated and whites voted as a bloc for the prevailing candidate. *See supra* Table 3. Of those sixteen elections, four involved minority candidates, and in all four elections the minority candidate was defeated. *See supra* Table 4.

However, this case illustrates the danger of relaxing the first *Gingles* precondition and allowing plaintiffs to proceed on less than a showing that the minority at issue would be a majority in the proposed district. In *Goosby*, there was no

question that blacks would constitute a majority in the new proposed district--52.47% of the VAP. *Goosby*, 180 F.3d at 489. When that requirement is relaxed and when partisanship cannot be considered in connection with the third precondition, the third precondition can be effectively eviscerated. The smaller the racial minority is, providing that it supports the minority political party in a district, the more likely it becomes that the racial minority will always be outvoted by the majority, which is both white and consists of members of the majority political party in that district. Those results may say nothing about "legally significant" white bloc voting, but only support the unremarkable proposition that groups that cannot muster a majority of voters will lose an election because they have fewer votes.

Having recognized the problems with allowing crossover claims such as this one, we will nonetheless consider the plaintiffs' claim that their proposed district would provide blacks in Nassau County an ability to elect candidates of choice.

(c) *Electability*

As the Supreme Court has explained, section 2 of the VRA "places at least the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders." *Voinovich*, 507 U.S. at 155. The Court of Appeals for the Seventh Circuit warned that relaxing the bright-line majority-in-a-district rule would invite courts to "build castles in the air," and it thus declared that proof of "the potential to elect must be solid and substantial. It cannot be speculative." *McNeil*, 851 F.2d at 944; *see id.* at 943-44 (recognizing that various factors may affect potential to elect, including crossover voting, and enforcing majority-in-a-district rule to ensure "clarity and uniformity"). In order to proceed with their vote-dilution claim, the plaintiffs must prove that black voters have the ability to elect candidates of their choice in Plaintiffs' Proposed District 8. One reason for this proof is that it is not the role of courts to intrude upon a state legislature's responsibility in redistricting based on slight mathematical

adjustments the calculation of which is largely beyond the expertise of judges and better suited to legislatures. *See, e.g., Latino Political Action Comm. v. City of Boston*, 784 F.2d 409, 412 (1st Cir. 1986) (Breyer, J.) (stating that projections of future electoral results rely on "the very finest of political judgments about possibilities and effects--judgments well beyond [judicial] capacities").

In addition, the plaintiffs must prove electability because electability is acting as a substitute for the first *Gingles* precondition, which provides a measure for whether there has been an *injury*. *See Gingles*, 478 U.S. at 48, 50 n.17 (stating that potential to elect "in the absence of the challenged practice" is necessary show vote-dilution). The plaintiffs' arguments that the proposed district may be generally "competitive" or that the population will grow and in the future provide the ability to elect are beside the point. The purpose of looking into electability is not only to determine whether there is a possible remedy, but also to determine whether a legislative plan diluted a minority group's voting strength and impaired its potential to elect candidates of choice. *See Growe*, 507 U.S. at 40-41 (explaining that unless *Gingles* conditions are established, "there neither has been a wrong nor can be a remedy").

To prove that Proposed District 8 is an effective black district, the plaintiffs relied largely on the expert testimony of Dr. McDonald, who performed "recompilation" and "supplemental electability" analyses. In addition, the plaintiffs have offered analyses by Dr. Handley and anecdotal evidence from witnesses such as Sen. David Paterson, the minority leader of the State Senate who represents a district in Manhattan. The defendants have challenged the plaintiffs evidence based primarily on the testimony of their expert, Dr. Stanley.

i) *Recompilation*

Recompilation analysis does not involve statistical estimates, complicated regression analyses, or margins of error. (*See* McDonald Decl. ¶ 62.) It simply looks at the votes actually

cast in the voting precincts in each Senate district and then recompiles a vote count for those precincts that would comprise the proposed district. The purpose of the method is to see whether a minority-preferred candidate who garnered a minority of votes in the current Senate districts would have "prevailed" if the districts were drawn according to the plaintiffs' plan.[67]

For example, the 2002 election for Governor matched George Pataki (R) against Carl McCall (D), who is black and was the black-preferred candidate. In the actual election, Pataki defeated McCall in SDs 6-9 by an average of 27,489 vote across the four districts. (PX 82.)[68] Dr. McDonald recompiled the votes cast in the portions of SDs 6-9 that comprise Plaintiffs' Proposed District 8. He found that if Plaintiffs' Proposed District 8 had existed, McCall would have received 32,496 votes in the hypothetical district, compared to Pataki's 28,011 votes. (*Id.*) McCall, the black-preferred candidate, would thus have "won" in Plaintiffs' Proposed District 8 by 4485 votes. The plaintiffs seek to extrapolate such results to argue that a hypothetical State Senate candidate like McCall would lose in any of the current districts but could nonetheless win the proposed district with minimal white crossover voting.

There are two particularly relevant features of recompilation analysis generally and as employed by Dr. McDonald. First, the analysis can only be performed by looking at elections that span the entire jurisdiction of the

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[67] The defendants contend that "Plaintiffs do not cite any cases where a recompilation of votes is relied upon to assess electability." (Defendant Bruno's Post-Trial Proposed Findings of Fact and Conclusions of Law ("DFF" or "DCL"), DFF ¶¶ 529-31.) The plaintiffs maintain that "[r]ecompiled election results have been used by a number of voting rights experts to assist in gauging the effectiveness of proposed minority districts." (Handley Decl. ¶ 18.)

[68] In SD 6, Pataki garnered 45,699 votes to McCall's 22,746, giving him 22,953 more votes. In SD 7, Pataki won by 50,184 to 22,521, for a difference of 27,663 votes. Pataki won SD 8 by 46,796 to 22,841, for a difference of 23,955 votes. And in SD 9, Pataki won 55,877 to 20,492, for a difference of 35,385 votes. (PX 82.)

proposed the district. Recompilation analysis thus depends strictly on exogenous elections and does not work with endogenous State Senate elections that are specific to any particular district. Dr. McDonald presented recompilation evidence for six statewide general elections and the 1988 presidential primary involving Jesse Jackson (although countywide elections could theoretically be used for recompilation analysis as well).

Second, Dr. McDonald only performed this analysis for elections that exhibited patterns of alleged racially polarized voting similar to the patterns found in State Senate elections–namely, elections where there was cohesive black support for one candidate and white bloc voting for the other candidate. The reason for doing this is to provide a better estimate of whether a black-preferred candidate could win a polarized State Senate race in the Plaintiffs' Proposed District 8. If Dr. McDonald included exogenous elections where there was no white bloc voting and substantial white support for the black-preferred candidate, it would appear easier for blacks to elect their candidate of choice. In contrast, a highly polarized statewide election would provide a more rigorous test for whether the black community could elect their candidate of choice in the proposed district with minimal white crossover support. To make it clear: the recompilation electability analysis presumes racially polarized voting and is not evidence of racially polarized voting.

Dr. McDonald examined six racially polarized statewide elections from 1996-2002 (minority-preferred candidate named first): (1) the 2002 election for Governor with Carl McCall versus George Pataki; (2) the 2002 election for Comptroller with Alan Hevesi versus John Faso; (3) the 2000 election for United States Senate with Hillary Clinton versus Rick Lazio; (4) the 1998 election for United States Senate with Chuck Schumer versus Alfonse D'Amato; (5) the 1998 election for Governor with Peter Vallone versus George Pataki; and (6) the 1998 election for Attorney General with Eliot Spitzer versus Dennis Vacco. (PX 68, 82). In each election, the black-preferred

candidate (also a Democrat) obtained fewer votes than the Republican candidate in each Nassau County Senate district. However, in five of the six elections, the black-preferred candidate would have received more votes than the Republican candidate in the Proposed District 8.[69] In the six elections, the black-preferred candidate received an estimated 13.4%, 31.3%, 30.2%, 29.2%, 14.8%, and 27.5% of the white vote, respectively. (PX 82.) White crossover vote for the sixteen State Senate elections analyzed for racial bloc voting averaged 30.4%. (*See* DX 149.)

The plaintiffs particularly emphasize the McCall/Pataki race for Governor in 2002 as the most rigorous test for electability in their proposed district. They consider it the most rigorous because only 13.4% of white voters in Proposed District 8 voted for McCall, but McCall would have received a plurality (49.7%) of the votes in the hypothetical district. (PX 69.) McCall's plurality, therefore, is primarily attributable to cohesive support from the black community.

The recompilation method and the evidence presented at trial, however, have substantial flaws and, in the end, are unpersuasive. Recompilation relies on elections that, according to all parties, are not particularly probative. Although both parties have consistently emphasized that endogenous, minority-white elections are the most probative, Dr. McDonald's recompilation analysis relies solely on statewide elections, most of which have no minority candidate. As Dr. McDonald himself explained, exogenous elections tend to lack probative value because elections "are going to be different across different levels of jurisdictions." (Tr. at 187 (McDonald).) Such elections will involve different issues, types of candidates, and media attention, as well as different kinds of campaigning and fundraising. (*Id.*) Moreover, the

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[69] In addition, Dr. McDonald looked at the 1988 Democratic presidential primary between Michael Dukakis and Jesse Jackson. Whereas Dukakis obtained substantially more votes in each Nassau County Senate district, Jackson would have received more votes than Dukakis in Plaintiffs' Proposed District 8.

exogenous elections--particularly high-profile races for Governor or United States Senate--do not account for the local effects of State Senate incumbency or possible "roll-off" that occurs with lower profile elections that are further down the ballot. Furthermore, as Dr. Stanley pointed out, recompilation does not take into account important factors, such as the rates of turnout, crossover, and cohesion, which are used to generate Dr. McDonald's supplemental electability analyses. (*See* Stanley Aff. ¶ 110). And the relative ease with which the minority-preferred candidates succeed in the plaintiffs' recompiled elections is inconsistent with Dr. McDonald's supplemental electability analysis and the anecdotal evidence presented at trial.

ii) *Supplemental Electability Analysis*

Dr. McDonald's second, supplemental electability analysis involves estimating support for a minority preferred candidate based on the sixteen State Senate general elections in SDs 6-9 in the years 1996, 1998, 2000, and 2002. The method estimates support by looking at (1) the percent of the VAP that is black and white in the proposed district, (2) the estimated turnout rates for black and white voters in the State Senate elections, (3) the estimated degree of black support for black-preferred candidates (black cohesion), and (4) the estimated degree of white support for black-preferred candidates (white crossover). This electability analysis, however, fails to provide sufficient evidence to prove that Proposed District 8 is an electable district for black-preferred candidates both because the methodology is unreliable and because the results are ambiguous at best and unfavorable to the plaintiffs at worst.

Dr. McDonald's data and supplemental electability analysis for the sixteen State Senate elections is summarized as follows:

[Chart Omitted]

To estimate blacks' ability to elect candidates of choice in Proposed District 8, Dr. McDonald projected an "average" scenario using the average rates for turnout and support for

the black-preferred candidate (cohesion and crossover) for each racial group. He also projected a "best case" scenario using the maximum values found for turnout and support. The maximum values are italicized in this Table and are all found in the 2000 elections.

Even taken at face value, the supplemental electability analysis undermines the plaintiffs' claim that the black community has the ability to elect a candidate of choice in the proposed district. For the sixteen State Senate elections, on average, an estimated 48.8% of the white voting age population turned out for the State Senate elections while only 17.3% of blacks turned out to vote in those elections. (DX 149.) The black-preferred candidate was supported by blacks at very high rates--94.6% cohesion, on average--and generated, on average, support from 30.4% of white voters. (*Id.*) When Dr. McDonald extrapolated those numbers for a district with a voting age population of 40.7% white and 34.5% black, he found that the black-preferred candidate would receive only 45.3% of the vote.[64] The white-preferred candidate, presumably the Republican incumbent, would receive 54.7% and handily win the election in the Plaintiffs' Proposed District 8. (*Id.*) Dr. McDonald explicitly acknowledged that he is on record elsewhere testifying that 45.8% is not a "competitive district." (Tr. at 105.)

The plaintiffs also failed to prove the reliability of Dr. McDonald's electability analysis. Dr. McDonald admitted that he could not speak to how competitive the proposed district would be without performing a competitive race analysis, which he did in a case in which he testified in Arizona. (Tr. at 105-07.) Such an analysis would have included the standard error for estimates of how partisan a district has to be in order

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[64] Dr. McDonald's analysis also included Hispanic voters, whose average turnout rate was 1.0% and who supported the minority-preferred candidate at a rate of 63.0%. (DX 149.) The inclusion or exclusion of Hispanic votes does not materially change the analysis.

for the minority-preferred candidate to win. As Dr. McDonald explained, the numbers for turnout, cohesion, and crossover support are "all based on statistical estimates, so there is going to be some degree of uncertainty to it." (Tr. at 108.) The standard error, or margin of error, provides a range of election results and indicates with 95% confidence that any given election will fall within that range. Generally, a smaller standard makes for more reliable and informative estimates--the uncertainty is more contained. Dr. McDonald, however, did not produce confidence intervals and provide standard errors for his electability analysis although he testified it would have been possible to do so. (Tr. at 107-09.)

Instead of performing a competitiveness analysis and providing a standard error, Dr. McDonald relied on what he called a "pseudo sort of analysis." (Tr. at 107.) He created a "best case scenario" using the highest levels for turnout and support for the black-preferred candidate for whites, blacks, and Hispanics found in the sixteen Senate elections. Based on those numbers, he estimated that the black-preferred candidate would garner 54.5% of the vote in the plaintiffs' proposed district. (DX 149.) Dr. McDonald testified that the best case scenario analysis "kind of is similar to what these 95 percent intervals are" in that 54.5% would represent the upper bound of the estimated vote for a black-preferred candidate. (Tr. at 108.)

Although blacks would be able to elect their candidate of choice under the "best case scenario," the plaintiffs provided no evidence that this scenario was ever likely to occur, and the history of recent elections provides no support for its likelihood. For example, the best case scenario assumes 37.7% white crossover support for the black-preferred candidate--the highest level of white crossover found in the sixteen elections. (*See* DX 149.) The likely Republican candidate in the plaintiffs' proposed district would be Sen. Hannon, the incumbent of the current SD 6, which constitutes much of the proposed district. (*See* Tr. at 538 (Paterson).) The white crossover rate in the 2002 election, in which Hannon ran against a black candidate, was

23.9%. (*See* DX 149.) The average crossover rate for the last four State Senate elections involving Hannon is 30.3%--very close to the average for all sixteen elections. Moreover, if Dr. McDonald were truly offering the "best case scenario" as an upper bound estimate, he should have provided a "worst case scenario" as a lower bound estimate.[65] He did not do so, and Dr. Stanley persuasively testified that there is no professionally acceptable way of knowing how much confidence one should place in Dr. McDonald's results. (*See* Stanley Aff. ¶¶ 134; *see generally id.* ¶¶ 116-21.) The best case scenario thus reflects little more than the cherry-picking of favorable numbers that produce a favorable--but ultimately artificial--result.

The supplemental electability analysis for Plaintiffs' Proposed District 8 has failed to prove that the proposed district would enable blacks to elect candidates of their choice. The reliability of the analysis is doubtful, and the plaintiffs simply failed to perform analyses that might have produced more probative results. Moreover, the plaintiffs' own electability projections cast doubt on blacks' ability to elect a senator of choice even in the proposed district.

iii) *Turnout, Warming, and Other Statistical and Anecdotal Evidence*

The supplemental electability analysis points to the crucial role of the turnout rate in determining whether blacks will be able to elect candidates of choice while being less than a majority of the VAP. In Proposed District 8 blacks would constitute 34.5% of the VAP.[66] If the turnout rates remain at the

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[65] The defendants, through Dr. Stanley, offered results for a "worst case scenario," but the results presented at trial were drastically and inexplicably different from those reported for the motions for summary judgment. (*Compare* Stanley Aff. ¶ 120, *with* Defs. SOF ¶ 173.) We thus disregard Dr. Stanley's "worst case scenario" projections, although his general point is well taken: The plaintiffs did not provide a worst case scenario estimate and have not provided any evidence that a "best case scenario" is likely.

[66] Although blacks would be 36.9% of the CVAP, all of Dr. McDonald's

levels estimated by Dr. McDonald, blacks would account for only 22.9% of the voters in State Senate elections. (*See* Stanley Aff. ¶ 122; *see also* DX 149 (giving turnout-rate data used by Dr. Stanley to calculate share of voters).) Whites would comprise 76.3% of State Senate voters in the plaintiffs' proposed district. (Stanley Aff. ¶ 122.) With those numbers, any black-preferred candidate could be elected only by a coalition consisting of more white voters than black voters. (*Id.*)

The critical importance of turnout rates was also highlighted by Dr. Handley, the plaintiffs' second electability expert. She analyzed voting patters in general elections to the Nassau County Legislature for Legislative Districts 1 and 2.[67] (*See* Handley Decl. ¶¶ 12-13.) Over 98% of the population in those districts would be in Plaintiffs' Proposed District 8, and the two legislative districts account for about half of the population that would be included in the proposed district. (*Id.*) State Senate districts have substantially more population that Nassau County legislative districts. Dr. Handley determined that for the legislative districts in the areas she analyzed, a 34% black VAP would be sufficient to provide black voters with an opportunity to elect minority-preferred candidates. Dr. Handley recognized that in the larger area that Dr. McDonald analyzed, he found higher minority percentages required to elect minority-preferred candidates. (*Id.* ¶ 13.) [68]

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statistics are generated using VAP. Moreover, Dr. McDonald testified that because of his method, using CVAP would not produce different numbers. (Tr. at 134-35.)

[67] Nassau County Legislature elections occur in odd-numbered years, in contrast to the State Senate elections, which along with most federal and statewide elections, take place in even-numbered years. While there was testimony that the electorates for the State Senate and County legislature elections are different, neither party elaborated on the issue. (*See* Tr. at 147 (McDonald).)

[68] Dr. McDonald admitted that he did not employ Dr. Handley's leading methodology for his district-wide analysis. (Tr. at 124-25.) The reason, he explained, was that Dr. Handley's method was based on analyzing two races

Dr. Handley identified the relative turnout rates of blacks and whites as an important reason for the different estimates. In the County legislative elections she analyzed, blacks have been successful in electing candidates of choice because blacks turn out for those off-year elections at rates roughly one-and-a-half times higher than whites. (*Id.* ¶ 14; Tr. at 148-49 (McDonald).) This turnout ratio was the basis for her conclusion that, in the districts she analyzed, blacks would be able to elect candidates of choice with only 34% of the VAP. According to Dr. Handley's analysis, if whites and blacks turned out at equal rates, blacks would need to constitute 42% of the VAP. (Tr. at 149 (McDonald).)

Under the estimates calculated by Dr. McDonald, blacks turned out for State Senate elections at an average rate of 17.3% while whites turned out at an average rate of 48.8%--nearly three times higher than blacks. (DX 149.) While Dr. Handley's testimony supports the theory that black turnout will increase if they can elect candidates of choice, her conclusions show that black turnout would need to increase dramatically in order for Plaintiffs' Proposed District 8 to be an "effective" black district. Indeed, the plaintiffs recognize the need to account for the gap in white and black turnout. They argue that the allegedly unfair districting schemes have suppressed voter participation for State Senate elections and that uniting the black community would spark an increase in interest and greater turnout. Because of these factors, they contend, the supplemental electability analysis actually underestimates black voting strength, and the Court should understand the analysis as showing generally that with increased turnout, the proposed district would be effective.

In arguing that black turnout would increase in the proposed district, the plaintiffs introduced testimony by Dr. McDonald and Dr. Handley on an alleged "warming effect."

(white and black), and when Dr. McDonald first set out to run his analysis, he was analyzing whites, blacks, and Hispanics. (*Id.*)

The warming effect is a sociological phenomenon where creating a competitive district with a solidified minority community promotes participation in the political process and raises turnout rates. (*See* McDonald Decl. ¶¶ 79, 95-97; Handley Decl. ¶¶ 15-16; Tr. at 136-39 (McDonald).) Senator Paterson testified from a more personal and political perspective that unfair districting practices created a downward spiral of political participation where voters feel alienated because they have no chance of success and thus withdraw from the political process. (*See generally* Paterson Aff. ¶¶ 35-42.) However, if members of Nassau's black community perceive that "they are part of vibrant campaign and can vote for a winning candidate," they will get more involved in the political process. (*Id.* ¶ 41.) Concentrating the black community in one district would also help increase voter mobilization efforts by allowing party members to devote their resources to just one, rather than four, Senate elections. (*See id.* ¶¶ 39-42.)

However, there is no reliable evidence that any "warming effect" would be sufficient to make Plaintiffs' Proposed District 8 a district in which blacks could elect candidates of choice. Dr. McDonald acknowledged that his testimony as to any warming effect was "speculation," largely based on his general work in political science and analyses of elections across the country. (Tr. at 138.) Upon questioning by the Court, he further admitted that warming in Nassau County was more of a subjective idea than a statistical one. (Tr. at 133.) Indeed, the plaintiffs did not perform any analyses comparing the turnout rates of minority communities before and after obtaining the ability to elect candidates of choice in different elections or in other locations in the state. There was no analysis of the average turnout rate across the state or the country for blacks when they constitute around one-third or 34% of the district.

To support the warming effect argument, Dr. McDonald recompiled the turnout rates for voters in the areas that comprise Plaintiffs' Proposed District 8, and he compared the recompiled turnout rate for statewide and State Senate

elections. Dr. McDonald found that on average, black voters who would be included in the proposed district turned out for their respective State Senate elections at an estimated rate of only 16.1%. (McDonald Decl. ¶ 80.) The recompiled turnout estimate for whites averaged 49.6%. For the statewide elections, however, the average estimated turnout rate for blacks jumped to around 28 to 29% while for whites it went down to around 42%.[69] (*Id.*) Dr. McDonald and Dr. Handley argue that these figures show that when black voters perceive that they can elect candidates of choices--as in the statewide elections--they will vote in greater numbers.

The recompiled statistics do not provide persuasive evidence of warming or that turnout will increase sufficiently to create an effective district.[70] The increased turnout rates can be attributed more to the fact that elections for Governor and United States Senator, for example, draw more attention than elections for state legislators. That is, the rise in turnout for the

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[69] Dr. McDonald reported recompiled turnout rates for seven of the ten statewide elections. Of the three elections he did not analyze, two were presidential elections that had relatively high turnout rates and would have slightly inflated the average. (*See* McDonald Decl. ¶ 80; DX 188.) The other election not reported was the 2002 Attorney General race between Spitzer and Irrizary. When the plaintiffs averaged the recompiled turnout estimates for the six racially polarized statewide elections, they found a turnout rate for blacks averaging 28.6% and for whites it was 42.7%. (PX 77.)

[70] There is also reason to question the reliability of the recompiled statistics. The recompiled statistics for the areas encompassing Proposed District 8 show that black turnout for statewide elections jumped to around 28% from 16% in State Senate elections--a 12% increase. But the difference in turnout is not nearly as dramatic when the statistics include all black voters in SDs 6, 7, 8, and 9. According to Dr. McDonald, the average estimated turnout for all black voters in SDs 6-9 was 17.3% in the State Senate elections. (DX 149.) For the ten statewide elections (including the presidential elections), black turnout in SDs 6-9 averaged an estimated 21.4%, which is only 4.1% higher than the turnout for the State Senate elections. (DX 188.) Neither party explained why the recompiled results showed a 12% increase in turnout rates for statewide elections while the results for all blacks in SDs 6-9 showed only a 4% increase.

statewide elections is likely attributable to "roll-off"--the tendency for people to cast votes for the most high profile elections at the top of the ballot while "rolling off" and leaving the ballot blank for the more obscure elections. (*See* Tr. at 144 (McDonald).) Both media attention and the physical position on the ballot affect the voting rates for a particular election, and roll off as a phenomenon is particularly prevalent among minority voters. (*Id.* at 145.) Dr. McDonald also conceded that he could not make judgments about the roll-off in New York because it would depend on the structure of the ballot, which he understood was "quirky" but which he had not studied. (*Id.*) The plaintiffs have provided no evidence beyond broad conclusory and unpersuasive statements that the higher statewide voting rates for blacks are attributable to the perceived ability to elect a candidate of choice. Moreover, even accepting the recompiled turnout rates for the statewide elections, whites still turned out at a rate roughly one-and-a-half times higher than blacks. According to Dr. Handley's analysis, the white/black turnout ratio would have to be the opposite for a 34% black voting age population to be sufficient for an effective district. (*See* Handley Decl. ¶ 14; Tr. at 148-50 (McDonald).)

Ultimately, as Dr. McDonald recognized, the ability of statistics to predict the future is limited, and election results will inevitably depend on "[w]hat candidates will be offered to the voters and how that might affect their voting patterns." (Tr. at 146.) In particular, Dr. McDonald acknowledged that incumbent candidates tend to have a substantial advantage, and it would be more difficult for a non-incumbent to win if one of the Republican incumbents ran in Proposed District 8. (Tr. at 130.) While Dr. McDonald did not specifically analyze any incumbency advantage for plaintiffs' proposed district, in a different case in Arizona, he estimated a 9.4% advantage for incumbents in congressional elections, though it was less for state legislative elections. (Tr. at 130.)

In fact, the parties acknowledged that the candidate likely to run for the Republicans in the plaintiffs' proposed district is

Sen. Hannon, the incumbent for SD 6, which constitutes the largest share of the plaintiffs' proposed district. Sen. Paterson credibly testified for the plaintiffs that Sen. Hannon, who has served in the State Senate for around fourteen years, would likely win in the plaintiffs' proposed district because he is the incumbent. (Tr. at 538.) Sen. Paterson further testified that Sen. Hannon would likely continue to win the district, and the opportunity to elect a black-preferred candidate would arise only after Sen. Hannon retires. (Tr. at 540-41.)

Virtually every federal court to consider the issue has interpreted *Gingles* as requiring the minority group to be a majority in a sufficiently compact district. If that test were applied here, the plaintiffs would plainly fail to establish a violation of section 2 in Nassau County. Even if the first *Gingles* factor were applied flexibly to accommodate crossover or "ability to elect" districts, the plaintiffs would have to prove that their proposed district would provide blacks with the ability to elect candidates of choice. *Cf. Growe*, 507 U.S. at 41. Given that the black VAP in the proposed district is nowhere near a majority, the plaintiffs had the burden to prove by credible and persuasive evidence that blacks would have the ability to elect candidates of choice in the Plaintiffs' Proposed District 8.

The plaintiffs have failed to satisfy their burden. Their evidence is often questionable in its reliability, and even if taken at face value, much of it actually casts doubt on the effectiveness of the plaintiffs' proposed district. Even the plaintiffs admit that for blacks to have the ability to elect candidates of choice in the proposed district there would have to be a dramatic increase in black voter turnout. While the plaintiffs presented intuitive theories suggesting that voting rates would increase in general, by the admission of the plaintiffs' own expert, estimating the degree of warming, if any, would be speculative. And at best, the district would be competitive only in the future, after the white-preferred incumbent retires. The danger, of course, in moving away from the *Gingles* majority-minority requirement is that it invites

claims that are "based on quite speculative foundations." *McNeil*, 851 F.2d at 944. If the first *Gingles* requirement were to be relaxed, there must be more compelling evidence of the minority's ability to elect than the plaintiffs have presented in this case for Nassau County.

Because we do not find that there is sufficient evidence to prove that Plaintiffs' Proposed District 8 is an effective black district, the drawing of SDs 6, 7, 8, and 9 could not have caused an injury that is cognizable under the VRA. We therefore do not need to reach the totality of the circumstances inquiry, which is considered only after the *Gingles* preconditions are satisfied.[71]

C. The Bronx (Count III)

1. *Introduction*

Count III is a black-Hispanic "minority-coalition claim" which advocates the creation of a fifth majority-minority district in the Bronx (Plaintiffs' Proposed District 36) based upon alleged Hispanic and black cohesion.[72] During the course of the litigation, the plaintiffs have also described this claim in terms of a single (Hispanic) minority. (*See, e.g.*, Pls.' Pre-Trial Br. at 14-15 ("Hispanics in the Bronx and Westchester counties 'have sufficient numbers to constitute a majority in [four] districts. So apportioned, the group will inevitably elect [four] candidates of its choice, assuming the group is

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[71] We also do not reach the question of whether in the plaintiffs' proposed district the amount of white crossover votes needed to elect a black-preferred candidate is so large that it is inconsistent with a finding that there is white bloc voting sufficient to satisfy the *Gingles* preconditions. *Cf. Abrams v. Johnson*, 521 U.S. 74, 92-93 (1997) (ruling that trial court did not clearly err in finding that the third *Gingles* precondition was not met where there was white voting for black candidates statewide that ranged from 22% to 38%, and electoral success for black-preferred candidates was demonstrated).

[72] The parties refer to the attempt to combine blacks and Hispanics for the purposes of the *Gingles* preconditions as a "coalition" claim. To avoid confusion with the distinct concept of a minority-white "coalition" or "crossover" claim, we refer to this count as presenting a black-Hispanic "minority-coalition claim." *See supra* note 37.

sufficiently cohesive.' " (quoting *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993))).)

The plaintiffs charge the legislature with failing to create an additional majority-minority district in the Bronx in 2002 and, thereby, "diluting the voting power of" Hispanic and black voters. (Compl.¶ 304.) Plaintiffs' Proposed District 36 would have a VAP of 50.1% Hispanic, 23.0% black, and 19.1% white. Its CVAP demographics would be 45.4% Hispanic, 26.0% black, and 23.4% white.[73] The plaintiffs argue that three alleged "discriminatory practices" together gave rise to the Legislature's failure to draw a fifth (out of five) majority-minority district in the Bronx. (*Id.* ¶¶ 303-05.)[74] First, the plaintiffs contend that the legislature "packed" minority voters into majority-minority SDs 28, 32, 33, and 36 (*id.* ¶ 307), and they propose to unpack those districts.[75] Second, the plaintiffs allege that SD 34 is a racially gerrymandered majority-white district (*see* discussion of Count VII, *infra*). (*Id.* ¶ 306.) Third, the plaintiffs contend that New York's population is distributed disproportionately to the detriment of "downstate." (*Id.* ¶ 308; *see* discussion of Count I, *supra*.)

The defendants deny the discriminatory practices alleged. They contend that the majority-minority districts are not packed. They point out that the Hispanic majorities in three of these districts were, in fact, reduced in 2002, and they argue that "unpacking" as the plaintiffs propose would raise section 5 retrogression problems. (*See* Burgeson Aff. ¶ 52 ("The

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[73] The creation of Proposed District 36 would eliminate the only majority-white district in the Bronx and would also entail (i) redrawing the entire Senate map to "equalize" population statewide and (ii) "unpacking" majority-minority districts in the Bronx. (*See* Compl. ¶¶ 306-08; Burgeson Aff. ¶¶ 49-50.)

[74] The Senate Plan has five districts based entirely or primarily in the Bronx: SDs 28, 32, 33, 34, and 36. SDs 34 and 36 have extensions into Westchester and SD 28 extends into Manhattan. We refer to these districts as the five Bronx districts.

[75] The plaintiffs also maintain that "[r]ather than drawing a majority-minority district, the Legislature ... dispersed some minority voters in southern Westchester County into the 35th Senate District." (Compl.¶ 164.)

difference between the Revised Plaintiffs' plan and the 2002 Senate plan is especially significant since the 1990's plan under the 2000 census, which I understand is the legal benchmark for Section 5 of the Voting Rights Act, had an average Hispanic VAP of almost 62% in the three comparable districts.... [M]inority population reductions such as those in the Revised Plaintiffs' plan are ... problematic ....").) They also contend that the drawing of SD 34 is consistent with preserving the core of the district and protecting incumbents, among other traditional districting principles. The defendants also point out that the Senate Plan's maximum deviation of less than ten percent is appropriate and that the plaintiffs' "upstate/downstate" claim did not survive summary judgment. *See Rodriguez*, 2003 WL 22853022, at *1.[76]

A central issue in this claim is whether to define the relevant minority group in terms of a Hispanic-black coalition or Hispanics alone. While courts are divided as to whether minority-coalition claims are cognizable, we follow the Court of Appeals for the Second Circuit in assuming that blacks and Hispanics can be combined in a section 2 claim if evidence is presented to show they are politically cohesive. *See Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir.) (affirming district court finding of Hispanic-black cohesion but also noting finding that "[i]t is preferable to create majority districts for each group"), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 281 F. Supp. 2d 436, 445 (N.D.N.Y. 2003) (citing *Bridgeport*). *Compare Concerned Citizens v. Hardee County Bd.*, 906 F.2d 524, 526 (11th Cir. 1990) ("Two minority groups ... may be a single section 2 minority if they can establish that they behave in a politically cohesive manner."), *with Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th

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[76] The plaintiffs respond that "statewide population disparities must be scrutinized solely within the context of whether their 'effect' as one of the voting practices at work here ... denies minorities the equal access to which they are entitled under Section 2." (Pls.' Post-Trial Mem., dated Dec. 11, 2003, at 11-12.)

Cir. 1996) (rejecting minority-coalition suits based on text, history, and purpose of VRA). However, as emphasized in *Growe v. Emison*, 507 U.S. 25, 41 (1993), the plaintiffs bear the burden of proving that Hispanics and blacks are politically cohesive and should be treated as the relevant minority group for the *Gingles* analysis and section 2 inquiry.[77]

We analyze Count III as both a "minority-coalition claim" and a single-minority claim. But however the claim is styled, we find that the plaintiffs have failed to establish vote dilution. Our findings, summarized, are as follows.

The plaintiffs can only establish the first *Gingles* precondition if we accept either that the plaintiffs can pursue their minority-coalition claim *or* that, counting Hispanics alone, a CVAP of 45.4% and a VAP of 50.1% are sufficient to establish a majority in a district. Even if the plaintiffs rely on Hispanic demographics alone, we find that they may be able to satisfy the first *Gingles* factor because Hispanics would be a majority of the VAP and a near majority of the CVAP, and because evidence supports their ability to elect candidates of choice in the proposed district.

With respect to the second *Gingles* precondition, the plaintiffs can show that Hispanics alone are politically cohesive. However, the plaintiffs cannot establish a minority-coalition claim based on Hispanic-black cohesion. *See Growe*, 507 U.S. at 41. Having made this finding under the second *Gingles* precondition, we analyze the third *Gingles* precondition with respect to Hispanics alone. We find that the plaintiffs appear to be able to establish the third *Gingles* precondition because white bloc voting usually defeats the Hispanic-preferred candidate, although these results may be attributable to partisanship rather than race.

Even if the plaintiffs are able to surmount the *Gingles*

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[77] Indeed, the parties have stipulated: "Blacks and Hispanics cannot be assumed to be a single racial group with common political aims that are usually frustrated because of bloc voting by a hostile non-Hispanic white majority." (Stip.¶ 133.).

preconditions, they have not shown under a totality of circumstances that the votes of minorities are diluted in the Bronx. Thus, we are not persuaded that any electoral law, practice, or structure has interacted with social and historical conditions "to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Among other totality considerations, we find that the Senate Plan achieves "substantial proportionality" because, among other reasons, Hispanics constitute 42.0% of the CVAP of the Bronx and "control" 60.0% (three of five) of the Senate Plan Bronx districts, and blacks and Hispanics together constitute 76.1% of the CVAP of the Bronx and "control" 80.0% (four of five) of the Senate Plan Bronx districts and, counting. *See De Grandy*, 512 U.S. at 1014-16. We also find that the Legislature's redistricting policies were sound and not "tenuous."

2. *Background to Plaintiffs' Proposed District 36*

The following facts, which are not in dispute, are relevant to our consideration of Count III. Bronx County had a total population of 1,332,650 in 2000, which was: 48.4% Hispanic, 31.2% black, and 14.5% white. The total Bronx VAP was 935,278 in 2000, including: 45.3% Hispanic, 31.0% black, and 17.7% white. The Bronx CVAP was 736,157 in 2000, including: 42.0% Hispanic, 34.1% black, and 20.6% white.

The 2002 Senate Plan includes five Bronx Senate districts, located entirely or primarily in that county, including three that are majority Hispanic (SDs 28, 32, and 33); one that is majority black (SD 36); and one that is majority white (SD 34). SD 28 is represented by Olga Mendez, a Hispanic Republican (formerly a Democrat), and is located primarily in the south and west Bronx (where 63.0% of the district falls) and also encompasses a relatively small part of northeastern Manhattan. Sen. Mendez was first elected in 1978.[78] SD 32 is represented by Ruben Diaz,

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[78] *ee The New York Red Book* 93 (Mary Ann Ryan-Germain ed., 97th ed.2003) (containing dates of service of current and past senators). Information about current incumbents is also available at http:// www.senate.state.ny.us.

a Hispanic Democrat, and falls entirely within the Bronx and is concentrated in the south Bronx. Sen. Diaz was first elected in 2002. SD 33 is represented by Efrain Gonzalez, a Hispanic Democrat, and falls entirely within the Bronx and is concentrated in the west Bronx. Sen. Gonzalez was first elected in 1989. SD 36 is represented by Ruth Hassell-Thompson, a black Democrat, and is concentrated in the north Bronx (where 86.8% of the district falls) but stretches from the south Bronx into Mt. Vernon in southern Westchester County. Sen. Hassell-Thompson was first elected in 2000. SD 34 is represented by Guy J. Velella, a white Republican, and is concentrated in the Bronx (where 69.8% of the district falls) but also includes portions of southern Westchester. Sen. Velella was first elected to the Senate in 1986.[79]

Under the Senate Plan, SDs 28, 32, 33, 34, and 36 combined contain a total population of 1,306,195, which includes 98.0% of Bronx County's total population, 14.6% of Westchester County's total population, and 7.5% of Manhattan's total population. (*See* DX 56, 73.) More than four-fifths (86.2%) of the total population of these five districts is located in the Bronx. (*See* DX 73.) By contrast, Plaintiffs' Revised Plan would include relatively less Bronx and more Westchester population. The five (entirely or primarily) Bronx districts in Plaintiffs' Revised Plan--Proposed Districts 31, 32, 34, 35, 36-- contain a total population of 1,240,074, which includes 93.1% of Bronx County's total population, 16.7% of Westchester County's total population, and 7.7% of Manhattan's total population. (*See* DX 56, 74.) Of the total population of the five districts in Plaintiffs' Revised Plan, 82.1% is based in the Bronx. (*See* DX 74.)

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[79] The 1990s Senate districting plan also included five Bronx districts. Three were majority Hispanic (former SDs 28, 31, and 32), one was majority black (former SD 33), and one was majority white (former SD 34). The 1990s districts were substantially similar geographically to their current form. Former SD 28 was represented by Sen. Mendez. Former SD 31 was represented by Sen. Gonzalez. Former SD 32 was represented by Pedro Espada and David Rosado. Former SD 33 was represented first by Sen. Joseph Galiber, then by Sen. Larry Seabrook, and then by Sen. Hassell-Thompson. Former SD 34 was represented by Sen. Velella.

Under the 2002 Senate Plan and Revised Plaintiffs' Plan, the racial and ethnic composition of the Bronx districts measured by VAP and CVAP is as follows:

TABLE 7: DEMOGRAPHICS FOR BRONX DISTRICTS UNDER 2002 SENATE PLAN[80]

2002 Senate Plan Districts	Incumbent	White VAP (CVAP)	Black VAP (CVAP)	Hispanic VAP (CVAP)	Black + Hispanic VAP(CVAP)
SD 28	Mendez	12.9% (15.6%)	28.8% (32.8%)	54.0% (48.4%)	82.8% (81.2%)
SD 32	Espada, Jr.	7.2% (7.8%)	30.0% (32.7%)	58.1% (56.3%)	88.1% (89.0%)
SD 33	Gonzalez, Jr.	13.0% (16.0%)	23.3% (27.0%)	56.7% (52.5%)	80.0% (79.5%)

[80] For data for Table 7 and Table 8, see PX 6 tbls. 11, 16, 27, 28. The population statistics in these tables are rounded off to the nearest tenth of a percent.

SD 34	Velella	59.5% (62.7%)	13.3% (13.5%)	20.4% (19.5%)	33.4% (33.0%)
SD 36	Hassell-Thompson	6.5% (7.7%)	65.2% (64.6%)	25.8% (25.6%)	(91.0%) (90.2%)

TABLE 8: DEMOGRAPHICS FOR PROPOSED DISTRICT 36 AND OTHER PROPOSED BRONX DISTRICTS

Plaintiffs' Proposed Districts	Incumbent (Corresponding 2002 SD)[81]	White VAP (CVAP)	Black VAP (CVAP)	Hispanic VAP (CVAP)	Black + Hispanic VAP (CVAP)
SD 36	[None][82]	19.1% (23.4%)	23.0% (26.0%)	50.1% (45.4%)	73.1% (71.5%)
SD 31	Mendez (2002 SD 28)	10.9% (12.4%)	30.5% (34.3%)	55.1% (50.8%)	85.6% (85.1%)
SD 32	Espada, Jr.	12.5%	30.5%	51.7%	82.2%

[81] The districts as numbered under the Revised Plaintiffs' Plan do not correspond to the districts as numbered under the 2002 Senate Plan. This column provides the corresponding 2002 Senate Plan District based on the geographic area covered and who the incumbent candidate would be. See DX 189 for a chart providing incumbent information and demographic data for districts under the 1992 Senate Plan, 2002 Senate Plan, and Revised Plaintiffs' Plan.

[82] As explained below, Plaintiffs' Proposed District 36, which is the focus of the plaintiffs' Bronx/Westchester vote-dilution claim, would draw its population from five existing districts and would provide an "open" seat.

	(2002 SD 32)	(14.2%)	(32.2%)	(49.7%)	(81.9%)
SD 34	Gonzalez, Jr./ Velella[83]	13.5%	28.4%	53.4%	81.8%
	(2002 SDs 33, 34)	(16.5%)	(32.5%)	(47.9%)	(80.4%)
SD 35	Hassell-Thompson (2002 SD 36)	29.6% (32.5%)	51.2% (48.8%)	15.1% (15.7%)	66.3% (64.5%)

As noted, the new majority-minority district proposed by the plaintiffs, Proposed District 36, would have the following demographics: 50.1% Hispanic VAP (45.4% CVAP); 23.0% black VAP (26.0% CVAP); and 19.1% white VAP (23.4% CVAP). It would draw its population from five existing districts, including three majority-minority Bronx districts and two majority-white districts, one in the Bronx (SD 34) and one in Westchester (SD 35), as follows: 1.1% of the total population would come from SD 32; 63.2% of the total population would come from SD 33; 3.9% of the total population would come from SD 34; 28.0% of the total population would come from SD 35; and 3.8% of the total population would come from SD 36. (DX 110.) Stated in other terms, Plaintiffs' Proposed District 36 draws 91.2% of its total population from two heavily Hispanic areas: the geographic center of SD 33, which is a majority-Hispanic Bronx district, and the portion of SD 35 (located in southwestern Yonkers) that has a Hispanic VAP of 41.4%. (*See* DX 74.) The Revised Plaintiffs' Plan includes four Bronx majority-minority districts that have smaller minority majorities than their current counterparts, the fifth district being the proposed new majority-minority District 36.3. *The First Gingles Precondition*

[83] Plaintiffs' Proposed District 34 would pair two incumbents--Sen. Velella, a white Republican, and Sen. Gonzalez, a Hispanic Democrat--in this majority-Hispanic district.

The plaintiffs contend that if Hispanics and blacks are counted together, or even if Hispanics are counted alone, they can satisfy the first *Gingles* precondition because minorities would constitute a majority of the total population and VAP in Proposed District 36.[84] The defendants respond that the first *Gingles* prong is met only if the proposed district is composed of (a) a majority of (b) the CVAP of (c) a single minority group. They thus argue that Hispanics alone should be counted for the first *Gingles* factor, and that because Hispanics constitute only 45.4% of the CVAP of Proposed District 36, the plaintiffs fail to meet their burden.

If blacks and Hispanics are counted together, they would easily constitute "a majority in a single-member district." *Growe*, 507 U.S. at 40. Together, they are 73.1% of the VAP and 71.4% of the CVAP in Proposed District 36. *See supra* Table 8. Nonetheless, because we find, as we explain below in our analysis of cohesion, that black and Hispanic voters are not cohesive in the Bronx, we must evaluate Plaintiffs' Proposed District 36 as a Hispanic district for the purposes of the first *Gingles* precondition. In doing so we consider (a) whether VAP or CVAP is the appropriate measure for determining a "majority" under the first *Gingles* factor and (b) whether Plaintiffs' Proposed District 36 would be an "electable" Hispanic district.

(a) *The Appropriate Measure*

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[84] The first *Gingles* precondition also requires the relevant minority population to be sufficiently geographically compact. The plaintiffs have offered six relevant measurements to indicate that Proposed District 36 is relatively compact. (*See* PX 6 tbls. 12, 17). These include four measurements (the Reock, Schwartzberg, Ehrenburg, and Polsby-Popper tests) that show Proposed District 36 is slightly "less compact" relative to the average Senate Plan district; and two (the Population Polygon and Population Circle tests) that show that Proposed District 36 is slightly more compact relative to the average Senate Plan district. We find overall that the plaintiffs have demonstrated, and the defendants do not appear to dispute, that the proposed Bronx district is "geographically compact" under *Gingles*. *See Gingles*, 478 U.S. at 50-51.

Counted alone, Hispanics would constitute a bare majority (50.1%) of the VAP in Proposed District 36 but less than a majority (45.4%) of the CVAP. Thus, if we were to adhere to a "bright line" majority requirement, the plaintiffs' majority claim fails on the basis of CVAP but possibly survives on the basis of VAP. Here, too, courts appear to differ. Some have measured "majority" by reference to VAP. *See, e.g., Solomon v. Liberty County*, 899 F.2d 1012, 1018 (11th Cir. 1990) (en banc) (Kravitz, J., specially concurring) ("[T]he undisputed evidence shows that blacks would constitute a[51%] majority of [the proposed district's] voting age population. That conclusively establishes that blacks are a sufficiently large ... group ... to be eligible for relief under the Voting Rights Act."). Other courts emphasize CVAP, observing that the Voting Rights Act specifically proscribes the "denial or abridgement of the right of any *citizen* of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (emphasis added); *see, e.g., Negron v. City of Miami Beach, Fla.*, 113 F.3d 1563, 1569 (11th Cir. 1997) (stating that "the proper statistic for deciding whether a minority group is sufficiently large and geographically compact is voting age population as refined by citizenship"); *France v. Pataki*, 71 F. Supp. 2d 317, 326 (S.D.N.Y. 1999) (criticizing plaintiffs' plan because "the proper measure of population [for purposes of the first *Gingles* requirement] is the total citizens eligible to register and vote" and plaintiffs' plan "failed to take citizenship [of Hispanics] into account" (citing *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir.1999))); *Session v. Perry*, 298 F. Supp. 2d 451, 494 n.133 (E.D. Tex. 2004) (observing that every court to "consider the question, has concluded that the relevant voting population ... is citizen voting age population"); *see also supra* note 38.

The Supreme Court has not ruled explicitly on the subject. It has advised that there is no "magic parameter" in section 2 cases, *De Grandy*, 512 U.S. at 1017 n.14, and that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich*, 507 U.S. at 158. In *De Grandy*, the Supreme Court explained:

> The parties' ostensibly factual disagreement raises an issue of law about which characteristic of minority populations (*e.g.*, age, citizenship) ought to be the touchstone for proving a dilution claim and devising a sound remedy.... As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases.

De Grandy, 512 U.S. at 1008-09 (citing *Voinovich*, 507 U.S. at 154; *Growe*, 507 U.S. at 41-42, n.5; *Gingles*, 478 U.S. at 46-47 & n.12).

We will assume *arguendo*, on the specific facts presented here and without conclusively deciding the issue of law, that an ethnic minority group constituting a majority (50.1%) of the VAP and a near majority of the CVAP (45.4%) in a single-member district may under some circumstances satisfy the first *Gingles* precondition. *See Solomon*, 899 F.2d at 1018 ("This holding should not be read to imply an opposite result where blacks do not constitute an outright majority of the [VAP] in any district.... In other cases, blacks may be so close to fifty percent that they would have a realistic chance of electing a representative ....").

(b) *Electability*

Because we find no Hispanic-black cohesion and because the plaintiffs' proposed Hispanic majority is numerically tenuous, it is important for the plaintiffs to show that their proposed district is "electable" for Hispanics. *See Gingles*, 478 U.S. at 50 n.17. The plaintiffs argue that the two electability analyses--recompilation and supplemental electability analysis--conducted by their expert, Dr. McDonald, demonstrate that Proposed District 36 would be an effective district for Hispanics. The defendants question the plaintiffs' methodology and challenge their conclusion that either analysis reliably demonstrates electability.[85]

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[85] With respect to the Nassau County claim, we first made findings about racial polarization, the plaintiffs' methodology, and the elections analyzed before proceeding to the electability analysis. Because we have already

i) *Recompilation*

The plaintiffs contend that, on the basis of "recompiled" elections, Proposed District 36 would provide Hispanic voters with an electable district. As explained with respect to Count V involving Nassau County, in recompilation, results from prior (exogenous) elections are re-aggregated or recompiled in an effort to determine whether minority voters would have an opportunity to elect their preferred candidate in a proposed district. "The recompilation of election results entails no statistical estimation .... Recompilation is simply a procedure of aggregating votes from elections[ ] for the area composing a proposed district." (McDonald Decl. ¶ 62.)[86] For his recompilation analysis, Dr. McDonald used elections that he determined (i) offered all voters the same choice of candidates and (ii) featured a "[Hispanic]-preferred candidate fac[ing] racial bloc voting on the part of white voters, comparable to the racial bloc voting [he] found in [his] analysis of the State Senate elections in the same areas [SDs 34 and 35]." (*Id.* ¶¶ 61-62.)[87] Dr. McDonald argued that "racially polarized elections" provide the "toughest test" for Hispanic-preferred candidates. (*Id.* ¶ 60; Tr. at 220 (McDonald); *see also* Handley Decl. ¶ 20.)

The New York gubernatorial races won by Governor Pataki in 2002 and 1998, among others, were selected by Dr. McDonald for recompilation. (*See* McDonald Decl. ¶ 65.) Dr. McDonald determined that the Hispanic minority-preferred candidate in both gubernatorial elections (Carl McCall, who is black, in 2002 and Peter Vallone, who is white, in 1998) were

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provided a foundation for those concepts and because extensive discussion of electability is not necessary for the Bronx claim, we will proceed with the electability analysis here as a subset of the inquiry into the first *Gingles* precondition.

[86] *See supra* note 60 (noting parties' dispute over validity of recompilation method).

[87] Dr. McDonald analyzed only majority-white SDs 34 and 35 for racial polarization on the theory that the "packed" minority districts in the Bronx have relatively few whites and are, therefore, "not relevant to the *Gingles* analysis." (McDonald Decl. ¶ 19.)

favored by an estimated 35% and 39%, respectively, of white voters, but in both cases "won" Proposed District 36 by a large margin. (*Id.*) Thus, in 2002, while Pataki beat McCall by a large margin statewide (and in SDs 34 and 35), Pataki would have lost to McCall by 8320 votes in the proposed district, under Dr. McDonald's recompilation analysis. (PX 68.) In 1998, Pataki beat Vallone by a substantial margin statewide (and in SDs 34 and 35) but in Proposed District 36 Pataki would have lost to Vallone by 12,886 votes, according to Dr. McDonald. (McDonald Decl. ¶ 65; PX 68.) Dr. McDonald also reported recompilations of three additional elections that he determined were racially polarized only in SD 34 (not SD 35). Each of these three elections (i.e., the 2000 United States Senate race, the 1998 United States Senate race, and the 1998 Attorney General race) showed that the Hispanic-preferred candidate won by a large margin in Proposed District 36. (*Id.* ¶ 66.) In the 2000 United States Senate race, the Hispanic-preferred candidate won by 48,041 to 9565; in the 1998 United States Senate race, the Hispanic-preferred candidate won by 28,423 to 8023; and in the 1998 Attorney General race, the Hispanic-preferred candidate won by 24,994 to 6921. (PX 11.)[88] The defendants' expert, Dr. Stanley, challenged Dr. McDonald's recompilation methodology on three principal grounds and analyzed certain elections to assess Dr. McDonald's conclusions. First, Dr. Stanley complained that "for his electability analysis, Dr.

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[88] Dr. McDonald also analyzed three racially polarized primary elections (i.e., the 1988 Democratic presidential primary, the 2001 Democratic mayoral runoff, and the 2001 Democratic city comptroller primary) to assess the ability of minorities (but not particularly Hispanics) to nominate their preferred candidate in the face of white bloc voting. He concluded that each election demonstrated that minorities would have the ability to elect the candidates of their choice in Proposed District 36. (McDonald Decl. ¶¶ 67, 69-72.) In addition to Dr. McDonald's results, the plaintiffs have provided recompilation results from two elections which they argue also show that the Hispanic-preferred candidate would have won by large margins in Proposed District 36 but which were not racially polarized. (*See* PX 11, 13.) In the 2002 State comptroller race, the Hispanic-preferred candidate won in Proposed District 36 by 21,379 to 6305. In the 1998 State comptroller race, the Hispanic-preferred candidate won in Proposed District 36 by 30,149 to 4319. (*Id.*)

McDonald offers predominantly white-white contests in exogenous elections." (Stanley Aff. ¶ 108.) Second, Dr. Stanley criticized Dr. McDonald's recompilation because it did not "entail any assessment of turnout, cohesion or white cross-over voting[,] the method used to analyze minority success and voting patterns for the existing districts." (*Id.* ¶ 110.) Third, Dr. Stanley pointed out that Dr. McDonald's analysis "included and excluded elections in a biased manner to suggest that the existing districts provide less opportunity than they actually do to elect minority preferred candidates." (*Id.* ¶ 109.)[89]

ii) *Supplemental Electability Analysis*

The plaintiffs contend that a second analysis based on seven endogenous elections shows that Hispanics would be able to elect their candidates of choice in Proposed District 36. The defendants counter that the plaintiffs' expert's methodology is unreliable and that the analysis says little about Hispanics' actual ability to nominate and elect candidates of choice.

As explained with respect to the Nassau County claim, Dr. McDonald's supplemental electability analysis is a statistical estimate based upon turnout and upon his racial bloc voting analysis of endogenous elections.[90] He testified that the seven

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[89] Dr. Stanley pointed to three elections that were excluded by Dr. McDonald--the 2000 and 1996 presidential elections and the 2002 attorney general election--where the minority-preferred candidate, in fact, "carried all of the existing districts." (Stanley Aff. ¶ 109.) After conducting his own election analysis, he concluded that minorities already have an opportunity to elect candidates of their choice in SDs 34 and 35. (*Id.* ¶ 113; DX 157.) Dr. Stanley also criticized the inclusion of the 2002 gubernatorial election because, he argued, it was more racially polarized than endogenous elections. (Stanley Aff. ¶ 109.) These points may be probative for the third *Gingles* precondition and the issue of whether racial bloc voting usually defeats Hispanic-preferred candidates, but they are not relevant to the issue of electability. The recompilation method presumes racial bloc voting; it does not purport to be evidence of it.

[90] Dr. McDonald used the following method in performing his supplemental electability analysis: (1) calculate the average estimated turnout for each minority group; (2) calculate the average estimated vote share that the

endogenous elections he analyzed show that the Hispanic-preferred candidate in Proposed District 36 would receive 56.1% of the total vote on average and, in the "best case," 64.5% of the total vote. (McDonald Decl. ¶ 77.)[91] And, he predicted that based on demographic trends, these electability numbers "will continue to improve during the course of the present decade." (*Id.* ¶¶ 45-47.)[92] The defendants' expert, Dr. Stanley, complained that, "[a]lthough this appears to be a 'winnable' district," Dr. McDonald's analysis "provides little evidence that the proposed 'Hispanic district' 36 would empower Hispanic voters relative to the existing situation." (Stanley Aff. ¶ 128.) He estimated that Hispanics would constitute only 16.5% of the actual voters in the proposed district and "would not be able to independently choose the winning candidate." (*Id.* ¶ 129.) Dr. Stanley observed that "projecting electoral success in Plaintiffs' District 36 on elections in Districts 34 and 35 is not reasonable since those districts comprise only 31.9%" of the proposed district. (*Id.* ¶ 130.) He also observed that, "[m]ost importantly, Dr. McDonald's [supplemental] electability analysis is based solely on *general* elections, although the minority-preferred candidate would obviously have to win the Democratic primary, particularly in this predominantly Democratic area," and he cites an absence of evidence that a Hispanic candidate would be victorious in such a primary. (*Id.* ¶ 132.)

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minority group's voters gave to the minority-preferred State Senate candidate; (3) multiply the two figures; (4) multiply the product of (3) by the minority group's percentage of the VAP in Plaintiffs' Proposed District 36; and (5) estimate how the total vote would be divided between the minority-preferred candidate and another candidate. (McDonald Decl. ¶ 74.)

[91] He also noted that in the one election (of the seven) in which there actually was a Hispanic candidate, that candidate received 45.5% of the vote. (McDonald Decl. ¶ 78.)

[92] Dr. McDonald also described a "warming" effect that would boost the electability of the district: "When minorities are given a chance of electing a candidate of choice, it is likely that they will turn out to vote at higher rates." (*Id.* ¶ 79.). As we did in the Nassau County electability analysis, we find that any predictions based upon an alleged warming effect are speculative.

While we recognize that there are questions about the reliability of the electability analyses, we conclude that, on balance, the plaintiffs' data suggest that Proposed District 36 would allow Hispanics to elect candidates of choice even with a 45.4% Hispanic CVAP. We found the electability evidence for Plaintiffs' Proposed District 8 in Nassau County insufficient because, among other things, the supplemental electability analysis projected that the black-preferred candidate, on average, would have received only 45.3% of the votes in a State Senate election. In contrast, the supplemental electability analysis for Proposed District 36 in the Bronx projects that the Hispanic-preferred candidate would receive an average of 56.1% of the votes in a State Senate election. The recompilation results are also stronger for this claim than the Nassau County claim. For example, the 2002 gubernatorial election involving Pataki and McCall presents the hardest test of electability for a minority-preferred candidate because of the low rate of white crossover. The recompilation results for Proposed District 8 showed McCall receiving 49.7% of the vote and "winning" only by a plurality. In Plaintiffs' Proposed District 36, however, the recompiled results show McCall with 58.8% of the vote. Other recompiled election results also tend to support the conclusion that the Proposed District 36 would provide Hispanic voters with, in Dr. Stanley's words, a "winnable" district.

Under these circumstances, because Hispanics in the proposed Bronx district would constitute a geographically compact majority of the VAP and a near-majority of the CVAP, and because evidence indicates that they would likely be able to elect candidates of choice, we find that the plaintiffs have presented sufficient evidence to pass the first *Gingles* threshold. As explained with respect to the Nassau County vote-dilution claim, the *Gingles* preconditions are directed at determining whether an injury occurred, and the focus on the concept of injury explains why, under these circumstances, the electability analyses have differing ramifications for the Nassau County and Bronx County claims.

In Count V, the plaintiffs complained that a substantial black population in Nassau County has been "cracked" by district lines and thus deprived blacks of representation in any Nassau County Senate district. But even though Plaintiffs' Proposed District 8 encompassed substantially all of the black population in Nassau County, blacks still would have constituted only 34.5% of the VAP and 36.9% of the CVAP in the proposed district. The central question of injury in that claim was thus whether black-preferred candidates were consistently defeated because of a voting practice that affected blacks as a minority race or simply because the black population was relatively small and in the political minority.

The core issue in the Bronx claim, unlike the Nassau County claim, is not whether *any* effective minority district can be created; the issue is whether section 2 of the VRA requires that a *fourth* Hispanic district be created. The central injury issue in the Bronx claim thus has more to do with proportionality than electability. However, to reach the question of proportionality, the plaintiffs must still establish the second and third *Gingles* factors.

4. *The Second Gingles Precondition*

The plaintiffs contend that Hispanics vote cohesively as a bloc ("Hispanic cohesion"); that blacks vote cohesively as a bloc ("black cohesion"); and that Hispanics and blacks vote cohesively together ("Hispanic-black cohesion"). The plaintiffs' argument is based on racial bloc voting analyses performed by their expert, Dr. McDonald, who focused upon election results from two majority-white districts, SDs 34 (Bronx) and 35 (Westchester). The plaintiffs argued that it is appropriate to do so because the other districts that would comprise part of Proposed District 36, namely, SDs 32, 33, and 36, "are packed majority-minority districts and thus not relevant to the *Gingles* analysis." (McDonald Decl. ¶ 19.)[93] While the defendants

[93] Together, SDs 34 and 35 comprise less than one-third of the plaintiffs' proposed majority-minority SD 36. The Bronx districts Dr. McDonald excludes from his analysis comprise more than two-thirds of Proposed

criticized the narrow focus on SDs 34 and 35, their expert, Dr. Stanley, did not analyze other districts. Instead, Dr. Stanley focused on Hispanic-black cohesion and argued, based on the regression analyses performed by Dr. McDonald for those districts, that no such cohesion exists. We conclude in the discussion that follows that, while Hispanic cohesion and black cohesion appear to be shown separately, the plaintiffs have not established Hispanic-black cohesion in the Bronx. Therefore, the plaintiffs' minority-coalition claim must fail.[94]

Focusing on contests in SDs 34 and 35, Dr. McDonald performed EI analyses for endogenous and exogenous elections in those districts and generated 38 election contest results.[95] The parties, however, dispute whether all elections should be included in the assessment of cohesion. Dr. McDonald excluded various elections for reasons explained below and based his cohesion assessment on 33 election analyses. Dr. Stanley criticized Dr. McDonald's exclusion of certain elections and based his assessment on all 38 election contest analyses performed.[96] While the parties categorized the

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District 36. (*See* DX 172.)

[94] Indeed, the parties have stipulated that: "Blacks and Hispanics cannot be assumed to be a single racial group with common political aims that are usually frustrated because of bloc voting by a hostile non-Hispanic white majority." (Stip.¶ 133.)

[95] Dr. McDonald performed separate EI analyses for elections in each district. Each statewide election--for example, the 2002 election for Governor--would generate results for two election contests: one in SD 34 and one in SD 35. On the other hand, an endogenous election for State Senate only involves one election contest. Thus if Dr. McDonald were analyzing the 2002 State Senate elections in SDs 34 and 35 and the 2002 election for Governor in those districts, there would be four "election contests" or four "election results" to be analyzed. We use these terms to distinguish between statewide and citywide elections and the multiple election contests or election results that they produce.

[96] In addition to the elections discussed below, Dr. McDonald mentioned in his declaration for trial two endogenous primary elections: the 2000 Democratic primaries for SDs 34 and 35. (*See* McDonald Decl. ¶ 24.) It is not clear, however, whether Dr. McDonald performed EI and regression analyses for these primaries. Data for these primaries is not included with the data for

election results in various ways, we observe that three kinds of elections define the universe of relevant results: (1) endogenous elections for State Senate Districts 34 and 35; (2) exogenous statewide elections for state and federal offices; and (3) exogenous Democratic primary elections involving minority candidates. We discuss these categories of elections and the corresponding contest results in turn.

Dr. McDonald analyzed seven State Senate (endogenous) general elections in SDs 34 and 35 between 1996-2002. Those elections are as follows:

TABLE 9: SEVEN ENDOGENOUS GENERAL ELECTIONS[97]

State Senate El-	Hispanic	Black	Hispanic- Black	White Bloc	Source

all other election contests. (*See* DX 146.) There is no reference to these primaries in Dr. McDonald's Master Table, which includes results even for elections that he later excluded for the purpose of assessing cohesion. (*Id.*) Moreover, Dr. Stanley did not include these elections in his cohesion and racial bloc voting assessments. We therefore do not include them for the purpose of our analysis.

[97] All of Dr. McDonald's election analyses can be found in DX 146, and this table is a simplified and reorganized version of the Master Table of Racial Bloc Voting Analyses in the beginning of that report.

ection[98]	Candidates[99]	Cohe- sion	Cohe- sion	Cohe- sion	Voting	Page[100]
2002 SD 34	Velella/Mahoney *	Yes	Yes	Yes	Yes	6
2002 SD 35	Spano/Ramos *	Yes	Yes	Yes	Yes	7
2000 SD 34	Velella/Koppel *	Yes	Yes	Yes	Yes	13
2000 SD 35	Spano/Abinati	Yes	Yes	Yes	Yes	14
1998 SD 34	Velella/Spallone *	Yes	Yes	Yes	Yes	22
1998 SD 35	Spano/Ploski *	Yes	Yes	Yes	Yes	23
1996 SD 35	Spano/Abinati *	Yes	Yes	Yes	Yes	30

In all of these elections, "Hispanics voted as a bloc, blacks voted as a bloc, [and] black and Hispanic voters cohesively supported the same candidate." (*Id.* ¶ 23.) Dr. McDonald concluded that "[t]he evidence from the endogenous elections, in both [SDs 34 and 35], is overwhelming that minority group voters have been politically cohesive.... The 2nd ... *Gingles* prong[is] clearly and unequivocally satisfied by the results in these elections." (*Id.* ¶ 25.)

Dr. McDonald performed EI analyses for 10 exogenous statewide general elections in SDs 34 and 35 between 1996 and

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[98] Elections in bold include a minority candidate.

[99] An asterisk (*) reflects the minority-preferred (i.e., Hispanic and black) candidate, if any. The candidate who actually won the election is listed first.

[100] The source page refers to the page for the data for the individual election analyses as numbered in DX 146.

2002,[101] thus generating results for 20 statewide election contests. Dr. McDonald included all the results except those generated out of the 2002 Attorney General election between Eliot Spitzer and Dora Irrizary. (*Id.* ¶¶ 36-37, 48-51.)[102] The statewide election results are as follows:

[Chart Omitted]

In the elections with a minority candidate--Carl McCall for comptroller in 1998 and governor in 2002--Dr. McDonald found Hispanic-black cohesion in SD 34 for both elections. He found Hispanic-black cohesion in support of McCall in the 1998 election in SD 35, but he testified that it "could not be determined, based on the 95% confidence interval, whether Hispanic support for McCall reached 60%." (*See id.* ¶ 36 (corrected)). In all fourteen statewide contests without a minority candidate, Dr. McDonald found Hispanic-black cohesion. (*Id.* ¶ 37.)

Dr. McDonald also presented the results from eight exogenous "local"--New York City and Bronx County--Democratic primary elections, each of which included a minority candidate and, according to Dr. McDonald, "show[ed] a strong pattern of racial polarization." (*Id.* ¶ 38.) (For these citywide and countywide elections, he analyzed only contests in SD 34 because SD 35, as noted, is in Westchester County.) He also generated results for three primary election contests that he excluded from his cohesion assessment: the 2001 CD 17

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[101] The exogenous statewide elections analyzed for the Bronx claim are the same statewide elections analyzed for the Nassau County claim. *See supra* Table 5.

[102] Dr. McDonald explained that he excluded the results in SDs 34 and 35 for the 2002 Attorney General election because Irizarry, a Hispanic Republican, was "a relative unknown running against a popular incumbent," Eliot Spitzer, a white Democrat (*id.* ¶ 29). Dr. Stanley criticized Dr. McDonald's discounting of this election for the purposes of examining racial bloc voting. He observed that "we can start taking elections out and putting them in, and recalculating averages and doing things of that sort and present other numbers, and they will be what they are, but they won't have this ... contest. Similarly, Governor Pataki was very popular in 2002[;] taking his contest out would ... affect results as well." (Tr. at 668.)

results for SDs 34 and 35 and the 1998 Lieutenant Governor results in SD 34.[105] The eleven citywide and statewide primary election results are as follows:

[Chart Omitted]

Dr. McDonald found Hispanic-black cohesion in four of the eight primaries (50.0%), each of which included one or more minority candidates. (*Id.* ¶¶ 39-46.) He noted that in the 2001 primary for Bronx Borough president (in SD 34), there were two Hispanic candidates (Espada and Carrión) and one white candidate (Eisland), and he stated that "black and Hispanic voters were estimated to have given Eisland 16.3% and 15.1% of their votes, respectively, ... [and the] two Hispanic candidates proved equally attractive to both black and Hispanic voters." (*Id.* ¶ 43.) Combining the vote estimates for the Hispanic candidates, he concluded "this election shows a strong pattern of racial polarization" and Hispanic-black cohesion. (*Id.*)

In sum, Dr. McDonald performed analyses for 38 election contests for SDs 34 and 35 and included in his assessment of cohesion the results for 33 election contests, including 7 endogenous general election results, 18 exogenous statewide general election results, and 8 exogenous citywide primary election results. *See supra* Table 9-Table 11. He found that Hispanic cohesion existed in 28 of 33 (84.8%) election contests; black cohesion existed in 29 of 33 (87.9%) election contests; and Hispanic-black cohesion existed in 28 of 33 (85.7%) election contests. The five contests lacking Hispanic-black cohesion included the 2002 Governor's election for SD 35 (where Hispanic cohesion was inconclusive) and four Democratic primary elections in SD 34.

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[105]. Dr. McDonald excluded the results because circumstances surrounding the elections purportedly diminished their probative value. The 1998 Democratic primary for lieutenant governor, Dr. McDonald claimed, included "candidates ... largely unknown in ... the Bronx[ ] and Westchester" and had low turnout. (*Id.* ¶ 28). He excluded the 2000 Democratic primary for CD 17 because of a "late-breaking" scandal involving the black candidate. (*Id.* ¶ 30.)

The defendants' expert, Dr. Stanley, assessed Hispanic-black cohesion based on the results of all 38 election contests for which Dr. McDonald performed EI analyses. In the elections that Dr. Stanley determined were most probative, namely, the 11 primaries with minority candidates, he found Hispanic-black cohesion in only three of eleven (27.3%). His analysis, in more detail, is as follows.

Preliminarily, Dr. Stanley raised serious, and we think cogent, challenges to Dr. McDonald's results, arguing that, "it is not possible to conclude that blacks and Hispanics are cohesive voting groups," even using Dr. McDonald's own election analyses. (Stanley Aff. ¶ 46.) "The only similarity between the groups," Dr. Stanley contended,

> is that blacks vote Democratic in overwhelming numbers and Hispanics, to a lesser extent, also tend to support Democrats in general elections. But this phenomenon, typical throughout the United States, is a very weak indication of cohesion since there are many jurisdictions in New York and the United States where whites are predominantly Democratic, but presumably would not, on that basis, be deemed "cohesive" with blacks or Hispanics. More importantly, *in both the minority/white elections Dr. McDonald deems the "best test" of cohesive voting by groups and in Democratic primaries, where partisanship is not a factor, blacks and Hispanics are not cohesive in the vast majority of elections.*

(*Id.* (emphasis added).)

Dr. Stanley also criticized Dr. McDonald's methodology, noting that Dr. McDonald "reports estimates from his three methods for a combined group—blacks and Hispanics—but does not rely on these estimates to draw conclusions about black and Hispanic cohesion. His conclusions about black and Hispanic cohesion rely instead on his separate estimates of each group's vote." (*Id.* ¶ 14.)

Dr. Stanley correctly noted that Dr. McDonald's "State Senate analyses are restricted to Senate Districts 34 and 35,

areas that contain *less than a third* of the population of the plaintiffs' proposed State Senate District 36. Findings for particular State Senate elections pertain to only a section of [the] proposed district." (*Id.* ¶ 75.)[111] Dr. Stanley further testified:

> Assessing voting patterns on the basis of such an extraordinarily small portion of the area alleged to be racially polarized can say very little about whether there are such voting patterns actually existing in that area. Indeed, any such analysis would seem to be a *facially invalid methodology* ....

(*Id.* ¶ 78 (emphasis added).)

Pointing out that the "vast bulk of Plaintiffs' proposed District 36 is contained by the current District 33 (63.2%)," Dr. Stanley argued, "Dr. McDonald, for some unexplained reason, entirely ignores these districts in assessing cohesion ... even though these districts contain a substantial majority of the population in Plaintiffs' District 36." (*Id.* ¶ 79.)

In the eleven elections which he determined to be most probative–statewide, citywide, countywide, and congressional primaries with minority candidates (*see* DX 148)–Dr. Stanley concluded that there was Hispanic-black cohesion in only 3 of 11 (27.3%) elections[112] and that "[b]lack and Hispanic voters

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[111] . SDs 34 and 35 comprise only 31.9% of the population of Proposed District 36 (with SD 34 constituting only 3.9%). (*See* Stanley Aff. ¶ 76; DX 172.) SDs 34 and 35 (under the 2000 census) comprise only 39.7% of the population of Proposed District 36 (with SD 34 constituting only 11.7%). (*See* Stanley Aff. ¶ 77; DX 171.)

[112] While the plaintiffs argued that the 2001 Bronx borough president race exhibited Hispanic-black cohesion, the defendants argued that it did not. (*See* Stip. ¶ 251; Joint Ex. 5 (noting disagreement); DX 146 at 52 (providing data for contest).) The dispute is over the fact, explained above, that Hispanics and blacks each split their vote evenly between two Hispanic candidates. Blacks and Hispanics thus cohesively voted for the Hispanic candidates against the white candidate, but there was no single cohesively supported minority-preferred candidate. The three primaries exhibiting Hispanic-black cohesion according to Dr. Stanley were thus the two 2001 mayoral primaries involving Ferrer and Green, and the 1997 Public Advocate primary.

were cohesive behind a candidate in only 2 of those 11 contests (18%) when white voters were not cohesive behind that candidate." (*Id.* ¶ 65.) In the latter two elections (namely, the 2001 Democratic primary for mayor and the subsequent runoff election), the minority-preferred candidate, Fernando Ferrer, "won the primary in District 34 and lost the runoff by only 139 votes." (*Id.*) Dr. Stanley concluded that "Hispanic voters were never cohesive for a black candidate [and b]lack voters were never cohesive for a Hispanic candidate, except Ferrer." (*Id.* ¶ 66.) He argued that "Dr. McDonald's evidence shows that when Hispanic voters had the choice of a black candidate in a Democratic primary, they seldom backed the black candidate. Indeed, in the six Democratic primaries with black candidates, Hispanics and whites voted together far more often than did Hispanics and blacks, who were cohesive only once, and in four of the other five such elections, Hispanics "voted cohesively against" the black candidate." (*Id.* ¶ 83; DX 167.) And in the seven Democratic primaries with Hispanic candidates, Dr. Stanley found that Hispanic-black cohesion "may have occurred, by the most favorable count, only half the time." (Stanley Aff. ¶ 52; DX 169.)

Dr. Stanley also analyzed seven general election contests involving minority candidates. The contest results are based on four elections (one endogenous, three statewide exogenous) and are as follows:

[Chart Omitted]

The sole endogenous contest was the 2002 Senate race in SD 35, in which "black and Hispanic voters were cohesive for a candidate when white voters were cohesive against the candidate." (Stanley Aff. ¶ 80.) But, as the defendants point out, the plaintiffs' own expert acknowledged on cross examination that the Hispanic candidate in this election was selected to run "to establish a record of racial bloc[ ] voting" for the litigation. (Tr. at 79-80 (McDonald).) In the other six contests in SDs 34 and 35, Dr. Stanley concluded that black and Hispanic voters "were predictably cohesive in these 6 contests, but were cohesive in only 2 of these 6 contests when white

voters were cohesive against the candidate." (Stanley Aff. ¶ 81.) [115] Thus, overall, in "only 3 of the 7(43%) elections were black and Hispanic voters cohesive for a candidate when white voters were cohesive against the candidate." (*Id.* ¶ 82 (misnumbered).)

Dr. Stanley also analyzed 20 statewide contests without minority candidates, which included 6 endogenous elections and 14 exogenous election contests. *See supra* Table 9, Table 10. He found: "Black and Hispanic voters were cohesive behind the same candidate, the white Democrat, in all 20 (100%) contests. In 11 of these 20 contests (55%), black and Hispanic voters were cohesive behind a candidate when white voters were cohesive against the candidate. This rate of black-Hispanic cohesion is again nearly double the rate of black-Hispanic cohesion exhibited in those same State Senate Districts when minority candidates ran." (*Id.* ¶ 85.)

We find the evidence sufficient to establish Hispanic cohesion separately (which the defendants do not appear to dispute), as reflected in Dr. McDonald's 33 election results and Dr. Stanley's 38 election results.[116] The plaintiffs have met the second *Gingles* precondition for Hispanic cohesion. At the same time, we find that the plaintiffs' proof is insufficient to demonstrate Hispanic-black cohesion. *See Growe*, 507 U.S. at 41 (citing *Badillo v. Stockton*, 956 F.2d 884, 891 (9th Cir. 1992)); *Hardee County*, 906 F.2d at 527; *Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988). The plaintiffs have not proven that Hispanics and blacks in the Bronx have "worked together and formed political coalitions." *Hardee County*, 906 F.2d at 527. Rather, the evidence is mixed with respect to when and with whom Hispanics, blacks, and whites form political coalitions in the Bronx. Where, as here, the two minority groups are

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[115]. In stating that there was Hispanic-black cohesion in all six exogenous contests, Dr. Stanley presumed that Hispanic cohesion was demonstrated in SD 35 for the 2002 Pataki/McCall election.

[116]. Hispanics were cohesive in 28 of 33 (84.8%) of the elections included by Dr. McDonald in his cohesion assessment and in 31 of 38 (81.6%) of the elections included by Dr. Stanley. (*See* DX 148.)

generally affiliated/registered with the same party (Democratic) and vote for that party's candidates at high rates, primary elections for that party's candidate are by far the most probative evidence of cohesion. And, the Democratic primary results presented here show that Hispanics and blacks are cohesive barely one third of the time.

The weaknesses in the plaintiffs' Hispanic-black cohesion claim are as follows:

First, we are not convinced that the existing districts (SDs 32, 33, and 36) that make up almost two-thirds (65.7%) of the VAP in the Bronx and provide over two-thirds (68.1%) of the VAP of Plaintiffs' Proposed District 36 must be ignored in assessing cohesion, as the plaintiffs argue. *See Gingles*, 478 U.S. at 60 n.28 (citing the need for "district specific" analysis). Such districts are plainly relevant, especially given the importance of primaries in discussing cohesion. The plaintiffs' own expert was unable to state affirmatively that the evidence of Hispanic-black cohesion was reliable. (*See* Tr. at 159-60.)[117]

Second, we are troubled by the fact that Dr. McDonald, while conceding that statistical procedures work better when more information is available and that "the combined [group]

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[117]Dr. McDonald testified to the sufficiency of the cohesion evidence as follows:

Q [The defendants]: Well, do you think you have got enough information to make a professional judgment about the extent to which blacks and Hispanics are cohesive in elections generally?

A [Dr. McDonald]: We have got as much information as we have.

....

JUDGE WALKER: Is there a point where it's reliable and a point where it's speculative[?]

A: There is not a good, you know, definition of when it would and would not be.

JUDGE BERMAN: Would this data that you have here be closer to the speculative range or the reliable?

A: It's borderline.

(Tr. at 159-60.)

estimates are usually more reliable than estimates for the groups in isolation" (Tr. at 123), presented evidence of Hispanic-black cohesion based on separate estimates of each group's vote. (*See* Stanley Aff. ¶¶ 14, 17.) We agree with Dr. Stanley that "[t]he fact that the *combined* black and Hispanic estimates so frequently contradict the individual estimates casts serious doubt on the reliability of the individual estimates." (*Id.* ¶¶ 16, 17.) [134]

Third, in the primaries analyzed, all of which included at least one minority candidate, we find that there was Hispanic-black cohesion in at most 4 of 11 (36.4%) election contests.[135] This is a critical cohesion figure. We do not accept the plaintiffs' suggestion that we should exclude three of these elections either because the candidate was little known, or because there was low turnout, or because controversy touched the election. Most of the primaries, for example, had low turnout. (*See* DX 146 at 45-52, 83, 152-53 (providing data).) Dr. Stanley was correct in observing that "[y]ou can look at these other contests and there are anomalies in each and every one of them. There is a question whether you should be throwing out elections or you should simply take all the data presented and see what it adds up to." (Tr. at 715-16.) Based on the evidence presented at trial, we find that Dr. McDonald did not evaluate systematically the contexts for the elections and did not apply any objective principle for excluding elections from his assessment. Moreover, even if we did exclude the three allegedly unreliable election results, there would still be Hispanic-black cohesion in only 4 out of 8 Democratic primary contests with minority candidates.

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[134] For example, Dr. Stanley cites 107 occasions out of 373 EI estimates in which "the *cohesion* estimate for vote share for a candidate for the combined group is outside the range for the groups estimated separately." (Stanley Aff. ¶ 16.)

[135] . We agree with the plaintiffs that the 2001 Bronx borough president race exhibited Hispanic-black cohesion (*see* DX 146 at 52), although the defendants dispute this point (*see* Stip. ¶ 251; Joint Ex. 5 (noting disagreement)).

We find that "[b]lacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation." *Session*, 298 F. Supp. 2d at 478. Because of this finding and the fact that the plaintiffs have presented cohesion evidence for a very limited portion of their Proposed District 36, the plaintiffs cannot meet their "higher-than-usual" burden to prove black-Hispanic political cohesion. *See Growe*, 507 U.S. at 41. The plaintiffs have not presented reliable evidence sufficient to prove that Hispanics and blacks in the Bronx should be treated as a cohesive minority group with unified political interests. *Cf. Gingles*, 478 U.S. at 51 ("[I]f the minority group is not politically cohesive, it cannot be said that the [existing plan] thwarts distinctive minority group interests.").

5. *The Third Gingles Precondition*

Because no Hispanic-black cohesion has been shown, we continue the *Gingles* analysis considering the plaintiffs' proposed (single minority) Hispanic-majority claim. The issue, under the third *Gingles* requirement, is whether the plaintiffs can prove that white bloc voting usually defeats the Hispanic-preferred candidate.

The plaintiffs focused on the 25 general election contests surveyed for SDs 34 and 35 (including 7 endogenous and 18 exogenous contests out of the 33 total election contests assessed for the cohesion analysis), to show that white voters typically voted as a bloc against the Hispanic-preferred candidate who was usually defeated by the white-preferred candidate. Those elections are as follows:

[Chart Omitted]

Dr. McDonald's strongest evidence was that in all seven endogenous general elections, "white voters voted as a bloc against the minority-preferred candidate[ ] and the minority-preferred candidate was defeated by the white-preferred candidate." (McDonald Decl. ¶ 23.) (In each such case, the Hispanic-preferred candidate and the minority-preferred candidate were the same.) Dr. McDonald concluded, on the

basis of these seven elections, that "[t]he evidence from the endogenous elections is overwhelming that ... minority-preferred candidates are usually defeated by racial bloc voting by white voters in the existing Senate districts. The ... 3rd *Gingles* prong [is] clearly and unequivocally satisfied by the results in these elections." (*Id.* ¶ 25.) Indeed, the plaintiffs need to emphasize these elections because the evidence of racial bloc voting for statewide exogenous elections was mixed, at best.[124]

The defendants' expert, Dr. Stanley, presented results from the 18 election contests with minority candidates, including one endogenous election, six exogenous statewide general election contests, and eleven exogenous Democratic primary contests. Those elections are as follows:

[Chart Omitted]

Dr. Stanley's universe included only five elections that Dr. McDonald had also focused on for the racial bloc voting assessment. Dr. Stanley found white bloc voting in 9 of 18 (50.0%) elections, racially polarized voting (as defined by Dr. McDonald) in 6 of 18 (33.3%) elections, and the defeat of the Hispanic-preferred candidate in 4 of 6 (66.7%) racially polarized elections. He concluded that even "[u]nder Dr. McDonald's own analysis, white bloc voting defeated the minority preferred candidate in *only* 4 of 18 contests involving minority candidates" in SDs 34 and 35. (Stanley Aff. ¶ 95.) In those 18 elections, according to Dr. Stanley, white bloc voting defeated the minority-preferred candidate in one of 11 primaries and three of seven general election contests. (*Id.*) Dr. Stanley noted that in the 2001 Democratic mayoral primary,

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[124]. The only exogenous elections with minority candidates were the 2002 Governor election and the 1998 comptroller election, both featuring McCall. For the exogenous elections in general, white bloc voting occurred in seven contests and the Hispanic-preferred candidate was defeated in six of those seven (85.7%) contests. In sum, for the seven endogenous elections and 18 exogenous general election contests, Dr. McDonald found white bloc voting (and what he termed "racially polarized voting") in 14 of 25 elections (56.0%) and he concluded the Hispanic-preferred candidate was defeated in 13 of 14 racially polarized elections (92.9%).

Ferrer, who is Hispanic, was backed by Hispanics in the Bronx part of SD 34 and actually won in that district. But in the run-off election that ensued, Ferrer, again backed by Hispanics, narrowly lost in SD 34 by 139 votes. (*Id.* ¶ 96.)

Dr. Stanley also observed "substantial crossover" voting by whites in minority-white elections, "with a 36.1% overall crossover rate and a 41.2% rate when blacks and Hispanics were cohesive, with a range of 5.0% to 90.7%." (*Id.* ¶¶ 100-01; DX 151.) Thus, he concluded, SDs 34 and 35 "are not jurisdictions that can be fairly characterized as racially polarized." (*Id.*) The defendants also criticize the plaintiffs' results because they rely heavily "on contests involving popular Republican incumbents," for example, Governor Pataki, Sen. Nicholas Spano, and Sen. Velella, who repeatedly "defeated Democratic challengers (the vast majority of whom were white)." (DFF ¶ 471.) As they argued with respect to Nassau County, the defendants claimed that any white bloc voting and defeat of Hispanic-preferred candidates was attributable to partisanship, not race.

"The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56. We have already determined that Hispanics are cohesive in the Bronx. With respect to white bloc voting, we find, and the parties agreed, that the most probative elections are endogenous elections. *See NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015 n.16 (2d Cir. 1995). And, in seven of seven (100%) endogenous elections white bloc voting defeated the Hispanic-preferred candidate. That is, there was a Hispanic-preferred candidate in each election; the Hispanic-preferred candidate received between (an estimated) 72.3% and 99.2% of the Hispanic vote in each election; the Hispanic-preferred candidate received between (an estimated) 27.1% and 39.7% of the white vote in each election; and each Hispanic-preferred candidate lost to the white-preferred candidate.

A more mixed result is shown in exogenous elections in SDs 34 and 35. In 20 exogenous general election contests, whites voted as a bloc in only seven (of 20) election contests; they did so in five of the ten election contests in SD 34. In six of the seven elections exhibiting white bloc voting, the Hispanic-preferred candidate was defeated. (And, in each election, whites in SD 34 gave greater support to the white-preferred candidate than they did in SD 35.) *See Gingles*, 478 U.S. at 55-58 ("Because ... the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district.").

Our conclusion that there appears to be white bloc voting is tempered by the facts that (i) the plaintiffs' evidence considers so little of the Bronx population and only about one-third of the Proposed District 36 population, and (ii) partisanship rather than race, which we discuss below, may be the cause. However, as explained in the context of the Nassau County claim, for the purposes of the third *Gingles* precondition, we do not inquire whether partisanship, rather than race, is the cause of any racial bloc voting. *See Goosby*, 180 F.3d at 493 (ruling that questions of partisanship should be addressed as part of inquiry into totality of circumstances rather than third *Gingles* factor). Therefore, we will assume without conclusively deciding that the plaintiffs have met their burden of proving the third *Gingles* precondition and proceed to an analysis of the "totality of circumstances," including partisanship. *See De Grandy*, 512 U.S. at 1013 ("As facts beyond the ambit of the three *Gingles* factors loom correspondingly larger, factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution."). As will be shown, a "totality" analysis defeats the plaintiffs' claim.

6. *Totality of Circumstances*

To prove a violation of section 2 of the VRA, the plaintiffs must ultimately establish, "based on the totality of the circumstances," that because of an unlawful voting practice or procedure, members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." VRA § 2(b), 42 U.S.C. § 1973(b). While the "totality of the circumstances" inquiry is guided by the Senate Factors [133] and the "substantial proportionality" analysis articulated by *De Grandy*, the inquiry must be geared toward the plaintiffs' theory of how the alleged voting practice dilutes the voting strength of minority voters and limits their opportunity to participate in the political process. A central part of the plaintiffs' Bronx claim is that the 2002 Senate Plan "packs" minorities into four Bronx districts, avoiding the creation of a fifth majority-minority district and diluting the voting strength of minorities in the Bronx.

The fact that the Bronx currently has three Hispanic-majority districts represented by Hispanic Senators and a majority-black district represented by a black Senator--which provides representation proportionate to the minority populations in the Bronx--is powerful evidence that Hispanics and blacks in the Bronx have equal access to the political process and have the ability to elect candidates of choice. "The extent to which members of a protected class have been elected to office in the State ... is one circumstance that may be considered ...." 42 U.S.C. § 1973(b). The plaintiffs first presented their claim as a Hispanic-black coalition claim, and by aggregating the minority populations, they asserted that four of the five Bronx districts were loaded with minority VAPs of around 80% to 90%. But those extreme supermajority-minority numbers are produced by treating blacks and Hispanics as a monolithic minority group. Because the plaintiffs have failed to show Hispanic-black cohesion, their

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133. *See supra* note 29 (listing Senate Factors); *see also Gingles*, 478 U.S. at 44-45.

claim must be analyzed as an issue of Hispanic vote-dilution. The Hispanic VAPs in the three Hispanic-majority districts range from 54.0% to 58.1%. *See supra* Table 7. This is clearly not a case where a minority population is "packed" into a certain number of districts denying them the representation that their numbers otherwise would have supported. Under these circumstances, the fact that Hispanics already have representation proportionate to their population in the Bronx is persuasive evidence that the 2002 Senate Plan does not employ invidious voting practices with discriminatory effects.

As we explain below, under the totality of the circumstances, the plaintiffs have failed to establish that the 2002 Senate Plan as it related to the Bronx violates section 2 of the Voting Rights Act.

(a) *Substantial Proportionality*

The defendants contend that the Legislature adopted a plan in 2002 which achieves "substantial proportionality" between majority-minority districts and population demographics. *See De Grandy*, 512 U.S. at 1013-14. The plaintiffs argue that the defendants cannot prove "statistical proportionality," and that, under *De Grandy*, the defendants' proportionality argument is, at most, a totality factor to be considered and is not a "safe harbor" or affirmative defense. 512 U.S. at 1014, 1021-22; *see also id.* at 1025 (O'Connor, J., concurring) ("The [majority] opinion's central teaching is that proportionality ... is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive.").

The parties presented proportionality calculations based on a claim that aggregated Hispanics and blacks in the Bronx. Because we find no Hispanic-black cohesion and have treated Proposed District 36 as a Hispanic-majority district, the inquiry here will focus on the representation of Hispanics. The defendants presented the following proportionality calculations relevant to Hispanics. First, in the Bronx, Hispanics form 42.0% of the CVAP (45.3% VAP) while 60% (three of five) of the districts are majority Hispanic. (DX 57-58;

PX 10.) Second, Hispanics are 21.1% of New York City's CVAP, which would equate to 5.5 Senate seats. In fact, Hispanics have six seats (if SD 31 is included) under the 2002 Senate Plan.[134]

The plaintiffs respond by redefining the geographic area relevant for the proportionality inquiry. First, the plaintiffs argue that the relevant universe should not be limited to the (five) New York City counties but should also include Westchester ("six-county region") because all of the districts with Hispanic majorities are in the six-county region. In the plaintiffs' six-county region, 23.7% of the VAP and 19.8% of the CVAP is Hispanic, but, according to the plaintiffs, in only 5 out of 28.6 districts in the six-county region (17.5%) do Hispanic

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[134] The defendants' other proportionality calculations, based on a minority-coalition claim involving blacks and Hispanics, are as follows: First, Hispanics and blacks combined are 76.1% of the Bronx CVAP (77.5% of the VAP), and 80% of the districts are majority-minority (four of five: three Hispanic, one black). Second, throughout New York City, Hispanics and blacks together constitute 46.9% of the CVAP (48.7% VAP), which would equate to 12.2 seats of the 26 seats falling wholly or primarily in New York City. In fact, blacks and Hispanics control 14 of 26 (53.8%) seats under the Senate Plan. Third, blacks are 25.8% of New York City's CVAP (24.0% VAP), which would equate to 6.7 of the 26 Senate seats. In fact, blacks have eight seats under the Senate Plan. Fourth, in the 35 Senate districts (SDs 1-34, and 36) that fall entirely or primarily in New York City and Long Island, the combined Hispanic and black CVAP is 37.4%. Under the Senate Plan, blacks and Hispanics control 14 of 35 or 40% of those districts. Fifth, throughout New York State, the (combined) black and Hispanic CVAP is 24.6% (28.3% VAP), which would equate to 15.3 Senate seats. In fact, blacks and Hispanics currently have the ability to elect candidates of choice or have a VAP majority in 15 districts. Sixth, there are four districts in New York State--SDs 12, 16, 23, and 26--in which black and Hispanic voters do not (together) constitute a VAP majority but do constitute a VAP majority when combined with other minority groups such as Asians--i.e., all voters other than non-Hispanic whites. (DX 62.) Minority groups thus combined constitute 29.4% of the CVAP, which would equate to 18.3 of 62 Senate seats. In fact, all groups thus combined have a VAP majority in 19 Senate seats. Stated in other terms, non-Hispanic whites constitute 70.6% of the State's CVAP and 69.4% of the Senate seats are (VAP) majority white.

voters have the ability to elect candidates of their choice. (Beveridge Decl. ¶ 111.) Second, the plaintiffs argue that the three-county region of the Bronx, Manhattan, and Westchester ("three-county region") is a relevant universe for assessing proportionality. They say that, including the Bronx and the Westchester portion (fraction) of SD 40 and the Manhattan portion (fraction) of SD 25, the three-county region contains 12.2 districts. The Hispanic VAP for the three-county region is 28.5% (CVAP is 23.8%) but Hispanics are able to elect the senator of their choice in three (24.6%) districts (SDs 28, 32, and 33). (*Id.* ¶ 114.)[135]

The Supreme Court has said that the appropriate measure is "substantial proportionality" between the number of majority-minority districts (or effective voting majority districts) and the minority group's share of the relevant population. *De Grandy*, 512 U.S. at 1013-15 ("The court failed to ask whether the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity."). We believe that the most appropriate geographical point of reference is Bronx County and the five districts under the Senate Plan that are located there entirely or primarily. *See id.* at 1022 ("[W]e have

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[135] The plaintiffs presented the following proportionality measures relevant to a Hispanic-black coalition claim: First, in the six-county region, in addition to the five districts in which Hispanic voters can elect their candidate of choice, there are eight more districts in which black voters can elect candidates of their choice. The six-county region has a combined black and Hispanic VAP of 46.6% (43.2% CVAP), which is estimated to grow in 2004. (Beveridge Decl. ¶ 120.) There are 13 Senate districts in this region in which black and/or Hispanic voters currently can elect their candidate of choice, or 45.5% of 28.6 districts. Second, the three-county region had a combined 48.6% black and Hispanic VAP (44.3% CVAP), which is estimated to grow during 2004. Under the Senate Plan, there are only five districts in this region in which black and/or Hispanic voters can elect their candidate of choice or 41.0% of 12.2 districts. Third, the combined black and Hispanic statewide VAP is 28.3% (24.6% CVAP), but black and/or Hispanic voters can elect the representative of their choice in only 14 districts, or 22.6% of the Senate districts. (*Id.*)

no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy."). These five districts in the Senate Plan include 98.0% of Bronx County's total population, and more than four-fifths or 86.2% of the total population of those five districts are based in the Bronx. Under the Senate Plan, four of the five Bronx districts (80%) are majority minority: three are majority Hispanic (60%); one is majority black (20%); and one is majority white (20%). Thus, the Senate Plan's Bronx districts are substantially proportional to the Bronx population, which has a CVAP of 42.0% Hispanic, 34.1% black, and 20.6% white, and which has a VAP that is 45.3% Hispanic, 31.0% black, and 17.7% white.[136]

"[P]roportionality is significant in evaluating dilution claims and has become a preeminent measure of fairness in redistricting." *Session*, 298 F. Supp. 2d at 477.[137] The fact that Hispanics, who already control three out of the five districts in

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[136] The Court in *De Grandy* posited a hypothetical jurisdiction in which a minority group comprising "40 percent of the [VAP] determines electoral outcomes in 7 out of 10 districts," thus "enjoy[ing] effective political power 75 percent above its numerical strength." *Id.*, 512 U.S. at 1017 & n.13. It cautioned that "reading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose." *Id.* at 1016-17. Plaintiffs' Proposed District 36 goes against the grain of *De Grandy*. For example, in the Bronx, where the Hispanic CVAP is 42.0% and the Hispanic VAP is 45.2%, The plaintiffs propose that 80% of the districts be majority-Hispanic--and 100% be majority-minority. *See Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998) (Posner, C.J.) ("[T]he proper benchmark for measuring proportionality is citizen voting-age population ...."); *see also De Grandy*, 512 U.S. at 1017 ("Failure to maximize cannot be the measure of § 2.").

[137] The Senate Plan includes three majority-Hispanic districts among the five Bronx-based districts (i.e., 60%). Under the Senate Plan (and based on CVAP), Hispanics currently "can be said to enjoy effective political power" 42.9% "above [their] numerical strength." *De Grandy*, 512 U.S. at 1017 n.13 (providing formula for calculation, which in this case is the difference between 60% (percent of Bronx districts that are majority Hispanic) and 42.0% (Hispanic CVAP), divided by 42.0% (Hispanic CVAP)); *see also Baines v. Masiello*, 288 F. Supp. 2d 376, 391-92 (W.D.N.Y.2003).

the Bronx, enjoy more-than-proportionate representation in that area is strong evidence that the 2002 Senate Plan does not "pack" Hispanics into the current districts so as to dilute their voting strength.[138]

(b) *Legislative Policies Underlying the Contested Practices*

The plaintiffs contend that each of the "[t]hree discrete discriminatory practices" alleged--namely, packing, gerrymandering, and overpopulating "downstate"--resulted in the Legislature's failure to draw a fifth (out of five) Bronx majority-minority district (Compl.¶¶ 305-08), and that with respect to each practice the underlying State policy is "tenuous," as defined in *Gingles*, 478 U.S. at 45 (citing S. Rep. No. 97-147, at 29, 1982 U.S.C.C.A.N. at 207). The defendants counter that the policies underlying each alleged practice are sound. "Regarding the idea of a 'tenuous' practice, the Senate Report states that a '*marked[ ] depart[ure] from past practices or from practices* elsewhere in the jurisdiction' would 'bear[ ] on the fairness of [a practice's] impact." *Niagara Falls*, 65 F.3d at 1008 n.6 (citing S. Rep. No. 97-147, at 29 n.117, 1982 U.S.C.C.A.N. at pp. 177, 207 n.117) (emphasis added). We find that the practices reflected in the Senate Plan are sound and that they are consistent with past and present practices of the Legislature.[139]

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[138]. We would also find proportionality considering Hispanics and blacks together. That is, blacks and Hispanics combined in the Bronx constitute 76.1% CVAP and have actual or effective voting majorities in 80.0% (or four of five) of the Bronx-based districts. Statewide, blacks and Hispanics combined constitute 24.6% of the CVAP and have actual or effective voting majorities in 24.2% (15 of 62) of the Senate districts. Blacks and Hispanics combined in New York City and Long Island constitute 37.4% of the CVAP and have actual or effective voting majorities in 40.0% (14 of 35) of the Senate districts. In New York City, Hispanics are 21.1% of the CVAP and have actual or effective voting majorities in 23.1% (six of 26) of the Senate districts. Blacks and Hispanics combined in New York City constitute 46.9% CVAP and have actual or effective voting majorities in 53.8% (14 of 26) of the Senate districts.

[139]. The gerrymandering claim is discussed *infra* in Part V, and the "upstate-downstate" claim is discussed *supra* in Part III.

We reject the central premise or thrust of the plaintiffs' Count III claim, which is that SDs 28, 32, 33, and 36 were "packed" in 2002 with minorities--that is, both Hispanics and blacks--and that it is appropriate to require the State to siphon off minority populations from the majority-Hispanic districts and from the majority-black district in the Bronx to create Plaintiffs' Proposed District 36. The plaintiffs' argument is that the four Bronx districts could and should have been drawn with smaller minority VAP and CVAP to facilitate the formation of a fifth majority-minority (Hispanic) district (with a 50.1% VAP and a 45.4% CVAP). That is, the plaintiffs contend that:

- SD 28, with a 54.0% Hispanic VAP and 48.4% Hispanic CVAP, should be redrawn to have a 51.7% Hispanic VAP and 49.7% Hispanic CVAP (Proposed District 32);
- SD 32, with a 58.1% Hispanic VAP and 56.3% Hispanic CVAP should be redrawn so that Hispanics have a 55.1% VAP and 50.8% CVAP (Proposed District 31); and
- SD 33, with a 56.7% Hispanic VAP and 52.5% CVAP, should be redrawn so that Hispanics are 53.4% of the VAP and 47.9% of the CVAP (Proposed District 34).

The plaintiffs thus would reduce both the Hispanic VAP and CVAP of these districts by an average of 2.9 percentage points, allegedly without jeopardizing the ability of Hispanics to elect candidates of choice or reducing their voting strength compared to the current Senate Plan. The plaintiffs also contend that the sole majority-minority black district, SD 36, currently consisting of a 65.2% black VAP and 64.6% black CVAP, could and should be substantially redrawn to have only a 51.2% black VAP and 48.8% black CVAP (Proposed District 35).[140]

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[140]. The plaintiffs cite unpersuasively to New York's 2002 section 5 submission to support their proposed Hispanic and black CVAP and VAP reductions in the Bronx districts. In SD 28, "Hispanic voters in the new district will clearly remain able to elect their preferred candidates"; in SD 32, "Hispanic voters will continue to comfortably elect their preferred representative at this VAP level"; in SD 33, "Hispanic voters in the new

The defendants correctly contend that the plaintiffs offer no authority for the proposition that section 2 of the Voting Rights Act compels the Hispanic and black VAP and CVAP reductions the plaintiffs seek--much less a finding that the difference between the VAP and CVAP of those districts in the Senate Plan as compared to the Plaintiffs' Revised Plan constitutes the difference between "packed" and "unpacked" districts. The defendants contend that the plaintiffs' proposed dilution of SDs 28, 32, 33, and 36 may threaten the continued viability of those districts for minority voters. (*See* Burgeson Aff. ¶ 52 ("The difference between the Revised Plaintiffs' plan and the 2002 Senate plan is especially significant since the 1990's plan under the 2000 census, which I understand is the legal benchmark for Section 5 of the Voting Rights Act, had an average Hispanic VAP of almost 62% in three comparable districts. My understanding is that minority population reductions such as those in the Revised Plaintiffs' plan are ... problematic....").) Indeed, the Democratic Senate minority leader and the plaintiffs' witness in this case, Sen. David Paterson, expressed his doubts that a 55% Hispanic-majority district would be an effective majority-Hispanic district. (*See* Stip. ¶ 105.) The plaintiffs would lower the CVAP in three of the four Hispanic "majority" districts proposed in their Revised Plan to under 50%. (*See* DX 60 (noting that Hispanic CVAP is 49.7% in Proposed District 32, 47.9% in Proposed District 34, and 45.4% in Proposed District 36).)

Moreover, the evidence from the redistricting process undermines any contention that the districts as currently drafted further a legislative policy that limits the opportunities for minority voters. Sens. Mendez, Espada, and Gonzalez voted in favor of the Senate Plan, and Sen. Hassell-Thompson "

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district will retain their clear ability to elect candidates of choice"; and in SD 36, "[the] increase in African-American voting strength does not negatively impact electability in other districts because it is not possible to shift voters out of this district and create a new majority-African-American district." (PX 27, at 8, 10-11.) While the submission speaks to the acceptability of the districts as included in the 2002 Senate Plan, it does not support further dilution of minority voting strength in those districts.

'supported the lines that were drawn that would configure her district.' " (Stip. ¶ 107; DX 135, 136.)[141] Far from reflecting an attempt to pack the Hispanic districts, the 2002 Senate Plan decreased the Hispanic VAPs in the Hispanic-majority districts by 4.2 to 7.4 percentage points. (*See* PX 27 at 7-11 (LATFOR's preclearance submission under section 5 of the Voting Rights Act for its 2002 Senate and Assembly Plans).)[142] The 2002 redrawing of the Hispanic-majority districts thus shows an attempt to move away from supermajority Hispanic districts while maintaining Hispanics' ability to elect their representatives of choice.

The plaintiffs' untenable proposition that the State should be required to reduce even further the Hispanic VAP and CVAP in the majority-minority Bronx districts flies in the face of logic and Supreme Court rulings. *See Session*, 298 F. Supp. 2d at 479 ("[S]tates are free to choose the best way to avoid retrogression and ensure equal opportunity to minority voters." (citing *Georgia v. Ashcroft*, 539 U.S. 461, 123 S.Ct. 2498 (2003))); *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995). *Georgia v. Ashcroft*, discussed earlier in the context of the Nassau County crossover claim, involved a "retrogression" claim under section 5 of the Voting Rights Act where the Democrat-controlled legislature developed a redistricting plan that "unpacked the most heavily concentrated majority-minority [State Senate]

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[141] The defendants also point out that, on the day before the redistricting vote was scheduled, when a fourth Hispanic district with a Hispanic VAP of only 44.8% (DX 62), was offered for the first time, no data was presented to suggest that a 44.8% Hispanic VAP district would have provided Hispanic voters with an opportunity to elect a candidate of choice. Nor was data presented to establish the electability of minority districts with the demographics proposed by the plaintiffs. (Burgeson Aff. ¶¶ 50, 52.)

[142] According to the statistics provided by LATFOR to the Department of Justice, the three Hispanic-majority districts were all drawn in 1992 to have Hispanic VAPs slightly over 60%. In 2002, the Hispanic VAPs in the three Hispanic-majority districts were drawn to be in the mid-50% range. The Hispanic VAP in the 2002 SD 28 was 7.4% less than in 1992 SD 28. The Hispanic VAP is 2002 SD 32 was 4.2% less than in 1992 SD 32. The Hispanic VAP in 2002 SD 33 was 5.3% less than in the predecessor district, 1992 SD 31. (*See* PX 27 at 7-11.)

districts ... and created a number of new influence districts." *Ashcroft*, 539 U.S. at ----, 123 S. Ct. at 2506. The plan in *Ashcroft* reduced by five the number of districts with a black VAP in excess of 60%, increased the number of districts with a black VAP of between 25% and 50% by four, and increased the number of 50% black VAP districts by one. *Id.* While the United States argued against preclearance because the plan eliminated safe black districts, the Supreme Court recognized that states must have "flexibility" in redistricting, including the latitude to choose one theory of effective representation over the other:

> The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority group, a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely--although perhaps not quite as likely as under the benchmark plan--that minority voters will be able to elect candidates of their choice. *Section 5 does not dictate that a State must pick one of these methods of redistricting over another.*

Id. at 2511-12 (citations omitted) (emphasis added).

While we recognize the difference between the section 5 analysis under *Ashcroft* and the section 2 analysis at issue here, "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Id.* at 2510 (citation omitted). It was reasonable and appropriate for the Senate to opt to maintain the cores of, and to support the incumbents in, its four majority-minority Bronx districts and one majority-white Bronx district given current Bronx demographics. We find no evidence in the record that the New York State Legislature in 2002 went outside permissible bounds in selecting its method of redistricting. *Id.* at 2512.

With respect to upstate/downstate population

differentials, we have found elsewhere in this decision that there was no invidious discrimination and the Legislature pursued legitimate, non-discriminatory redistricting goals. Nor is the "effect" of these population differentials problematic. In fact, when CVAP or registered or actual voters are taken into account, the purported disproportion between "upstate" and "downstate" (on the basis of total population) is reversed. *See supra* Part III (one-person, one-vote claim); (Defs. SOF ¶¶ 16, 18, 22). And, the parties have stipulated that the 2002 Assembly plan has a total population deviation of 9.43% (Stip.¶ 46), which is almost precisely the deviation in the Senate Plan (9.78%) (*id.* ¶ 45). The average deviation of each is also consistent, namely, 2.67% (Assembly) and 2.22% (Senate). (*Id.* ¶¶ 47-48.) The Senate Plan is plainly not a marked departure from "practices elsewhere in the jurisdiction." *Niagara Falls*, 65 F.3d at 1008 n.6 (citation omitted).[143]

With respect to alleged gerrymandering of SD 34, we find that traditional districting principles--including the desire to preserve the cores of existing districts and to protect incumbents--are clearly reflected in the Senate Plan. (*See, e.g.*, Burgeson Aff. ¶¶ 32-35, 38.) As we discuss in detail *infra*, the core of SD 34 was first established decades ago, and its preservation as a "Republican seat" in 2002 is not a departure but a continuance of past practices. *See Niagara Falls*, 65 F.3d at 1008 n.6 (citation omitted).

We find on the facts presented here that the Legislature was "free to choose the best way to ... ensure equal opportunity to minority voters." *Session*, 298 F. Supp. 2d at 479.

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[143] The underpopulation of "upstate" in the Senate Plan actually "prevents the creation of an additional Bronx-Westchester Hispanic-majority district such as Plaintiffs' Proposed District 36," as the plaintiffs themselves point out. (*See* Plaintiffs' Proposed Post-Trial Findings of Fact and Conclusions of Law ("PFF") ¶ 512.) And because nothing resembling the Proposed District 36 was suggested until the day before the Legislature's redistricting vote (*see* Tr. at 376 (Beveridge)), the population deviations could not have been "employed by the Legislature to deprive minority voters of the opportunity to elect candidates of choice in the Bronx" (PFF ¶ 504).

(c) *The Degree of Racially Polarized Voting and Political Partisanship*

The plaintiffs maintain that the evidence of racially polarized voting was adduced conclusively by Dr. McDonald in seven endogenous elections he analyzed. (*See* McDonald Decl. ¶ 23.) The defendants contend that the plaintiffs have failed to show polarization that is attributable to anything other than ordinary partisan politics, which we discuss in the next section of this decision. We have already described the relatively limited nature of the evidence about racial polarization in the Bronx. The evidence is certainly insufficient for us to conclude here that there is "a persistent and significant degree of racial polarization in" Bronx State Senate elections.

The defendants' expert, Dr. Stanley, argues that any patterns of racial polarization are attributable primarily to partisanship. He contends that "there is *more* disagreement between white and minority voters in white/white elections than in elections involving minority candidates. If race was a factor in voting, one would expect to see just the opposite." (*Id.* ¶ 40.) In all general (endogenous and exogenous) elections in the Bronx, he observed that white support for Democrats averages 42.9% in minority-white elections and 39.3% in white-white elections. (*Id.* ¶ 41; DX 170.) Among Hispanics in the same elections, support for Democrats averages 87.7% in minority-white elections and 91.6% in white-white elections. (*Id.* ¶ 42; DX 170.) Among blacks in the same elections, "support for Democrats averages 90.9% in minority-white elections and 91.9% in white-white elections." (*Id.*) And in Democratic primaries, "where partisanship is not a factor ...[,] there is no pattern of agreement between blacks and Hispanics that exceeds the extent to which whites and Hispanics agree." (*Id.*; DX 154.) "In short," Dr. Stanley concluded,

> Dr. McDonald's "evidence" of racial bloc voting consists of the fact that whites in Senate elections supported well-entrenched Republican incumbents who defeated all challengers, white or minority, and the fact that Governor Pataki, another popular incumbent who was easily

reelected, defeated Carl McCall in the 2002 gubernatorial election. The Senate election contests reveal no race-based disadvantage since the incumbents defeated all opponents of any race or ethnicity.

(*Id.* ¶ 45 (summarizing racial bloc voting analysis with respect to both Nassau and Bronx).) Dr. Stanley's conclusion with respect to the voting patterns in Nassau County and the Bronx was the same: "[A]ny divergence between white and minority voters, as well as any cohesion between black and Hispanic voters, is better correlated with partisanship than with race." (*Id.* ¶ 39.)

The plaintiffs say that the fact that divergent voting patterns may logically be explained by a factor other than race does not end the inquiry because racially polarized voting and partisanship are not mutually exclusive. *See Goosby v. Town Bd.*, 956 F. Supp. 326, 355 (E.D.N.Y.1997), *aff'd*, 180 F.3d 476 (2d Cir.1999). They argue that partisanship does not explain racial polarization better than race and that the evidence establishes that white voters in the endogenous elections analyzed support the minority-preferred candidate when that candidate is white at an average rate of 33.3%, but when the minority-preferred candidate is a minority (in only one contest), the support level drops to 27.0%. (PX 73.) With respect to primaries, the plaintiffs say that "the 2001 Democratic primaries ... show[ ] a strong pattern of racial polarization, and primary results cannot be explained by partisanship." (McDonald Decl. ¶ 54.)

Neither party to this litigation has, in addition to analyzing racial polarization, employed regression analysis to determine the relationship between voter support and party registration in election districts, and the correlations offered by both sides' experts based on EI results are inconclusive. While the plaintiffs' evidence is restricted to the more probative endogenous elections, it is also based on only one election (of seven) that had a minority candidate. At the same time, we cannot say that the defendants have established conclusively that partisanship is a better predictor of voting patterns than is race.

(d) *Official Discrimination*

The plaintiffs argue that "[t]here is a history of official discrimination" particularly in the Yonkers portion of the plaintiffs' proposed District 36. (PFF at 173.) In support of their position, the plaintiffs urge us to take judicial notice of the *United States v. Yonkers* public school litigation and state that the defendants should be "collaterally estopped from challenging the detailed findings of fact made" in that case. *See United States v. City of Yonkers*, 96 F.3d 600, 616 (2d Cir. 1996); *see also Yonkers*, 123 F. Supp. 2d 694, 706 n.20 (S.D.N.Y.2000) ("[T]here are policies and practices in Yonkers that disproportionately impact minority students and are traceable to the prior segregation, [and therefore] we conclude that those policies and practices are vestiges of discrimination."). The plaintiffs contend that the findings in *Yonkers* are relevant because the "area served by the Yonkers school district ... is completely contained in" Plaintiffs' Proposed District 36 and is "demographically very similar to the rest of" that district. (*See* Beveridge Decl. ¶ 154).

The defendants assert that the record confirms that "New York has ensured African-Americans the right to vote since 1874" and "has taken steps to encourage minority voting ...." *France*, 71 F. Supp .2d at 330. "[T]he state of New York has long been in the vanguard of the struggle for African American civil rights." *Reed v. Town of Babylon*, 914 F. Supp. 843, 886 (E.D.N.Y. 1996). The defendants cite thirteen stipulations agreed to by the parties in this case to demonstrate the ways in which New York State and New York City have sought to ensure equality of opportunity. (*See* Stip. ¶¶ 118-30 (noting, among other things, the enactment of laws forbidding discrimination in state employment (1918) (¶ 119) and creation of the New York City Commission on Human Rights (1955) (¶ 125)).) The defendants also argue that the most recent findings by the district court in *Yonkers* in 2000 were never reduced to final judgment because the case was settled prior to the issuance of a final judgment (or appeal), and that those findings are not the

proper subject for collateral estoppel effect.[144]

We are familiar with the *Yonkers* decision and keenly aware of the troubling history and the practices it has sought to ameliorate. At the same time, over two-thirds of Proposed District 36 comes from the Bronx, and we are not persuaded that the plaintiff has shown official discrimination in the Bronx that touches on or infringes the opportunities of minority voters. Indeed, the evidence presented at trial suggests that Hispanics--and the various ethnic groups that fall under that label--have very actively participated in local Bronx politics. (*See, e.g.*, Tr. at 559 (Paterson) (noting that Bronx has had Puerto Rican borough presidents going back to the 1980s); *see also id.* at 509-14).

Therefore, while we find the history reflected in *Yonkers* troubling and recognize the need for continued vigilance and resolve to ensure equality of opportunity, we do not find in the record a "history of voting-related discrimination in the State." *Gingles*, 478 U.S. at 44 (citing S. Rep. No. 97-147, at 28, 1982 U.S.C.C.A.N. at 205-06).

(e) *Socioeconomic Disparities*

The plaintiffs assert that "[t]he social condition of African American and Hispanic residents with respect to income, jobs, education, housing, and in many other ways, is substantially deprived compared to that of the white population in ... Bronx County, in Westchester County, and in the City of Yonkers." (Beveridge Decl. ¶ 123.) They contend that these disparities "manifest [themselves] in every aspect of life, plainly affecting their ability to participate in the political process." (*Id.* ¶ 123.) The plaintiffs assert that "the political process itself continues

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[144]. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[C]ollateral estoppel relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication."); *Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105, 109 (2d Cir. 2002). We do not believe collateral estoppel applies here because, among other things, the timing, claims, parties and issues in this case are not the same as in the case cited by the plaintiffs.

to deny [Hispanics and blacks] their 'fair share' of funding for schools and other programs that might serve to mitigate this deprivation." (Beveridge Decl. ¶ 123.) In addition to the *Yonkers* litigation, the plaintiffs cite *Campaign for Fiscal Equity, Inc. v. State* ("*CFE* ") to demonstrate that New York City's public school system does not provide students with a "sound basic education" that "prepares them to function productively as civic participants." *See CFE*, 100 N.Y.2d 893 (2003) (Kaye, C.J.).[145]

The defendants contend that the plaintiffs have not shown that socioeconomic disparities between whites and minorities are significant or that they are the result of official discrimination. They assert that "the record shows that socioeconomic disparities exist throughout the country and also that the status of minorities in the areas at issue ... is well ahead of minorities elsewhere ...." (DCL ¶ 81.) They cite to *Goosby*, 956 F. Supp. at 342, for the proposition that "differences in the socioeconomic status of blacks ... do not significantly impair their relative ability to participate in the political process," and to *Niagara Falls*, 65 F.3d at 1021, for the conclusion that "socioeconomic disadvantages have not hindered blacks' ability to participate in the political process."

It is certainly reasonable to observe that to some extent minorities in New York "bear the effects of past discrimination," *Gingles*, 478 U.S. at 44- 45 (citing S. Rep. No. 97-147, at 28-29, 1982 U.S.C.C.A.N. at 205-207), as reflected in the *CFE* decision with which we are familiar. At the same time, there is not a substantial or adequate showing that the socioeconomic status of minorities significantly impairs their

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[145]. "The issue to be resolved ... is whether the State affords New York City schoolchildren the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants. This is essentially the question the trial court addressed, and we conclude that the Appellate Division erred to the extent that it founded a judgment for defendants upon a much lower, grade-specific level of skills children are guaranteed the chance to achieve." *CFE*, 769 N.Y.S.2d 106 ("[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society.").

ability to participate in the political process in the relevant geographical area.

(f) *Electoral Mechanisms*

The plaintiffs argue that several New York State and City electoral mechanisms have "disproportionately affected" minority voters. (Hayduk Decl. ¶ 4.) They cite, among other things, to funding cuts for the State agency charged with implementing the National Voter Registration Act ("motor voter law") (*id.* ¶ 6); the alleged failure of New York City public assistance agencies adequately to implement the motor voter law (*id.* ¶ 8); polling problems such as sites opening late, a shortage of properly trained poll workers, and voting machine "breakdowns" (*id.* ¶ 10); the (past) practice of purging non-voters from voter rolls (*id.* ¶ 11); "lost votes" due to the decision of the City Board of Elections to disable sensor latches on voting machines (*id.* ¶ 20); the City's failure to provide sufficient numbers of language interpreters at polling stations (*id.* ¶ 22); and problems affecting particularly Asian voters, such as "[p]oll workers demand[ing] identification from ... voters" (*id.*).

The defendants contend that the plaintiffs have not produced evidence indicating that "either New York State or the particular parts of it at issue here have 'unusually large election districts, a majority vote requirement ... or other voting practices or procedures that might enhance the opportunity for discrimination against the minority group.' " (Thernstrom Aff. ¶ 41 (citing *Gingles*, 478 U.S. at 45 (citing S. Rep. No. 97-147, at 29, 1982 U.S.C.C.A.N. at 206-05)).) They cite to the measures taken by New York State and its localities in recent decades to expand the electorate (Thernstrom ¶ Aff. 16), including revamping the State's voter registration forms (*id.*), the City's expansion of voter registration sites (*id.*), and measures undertaken to implement the motor voter law (Tr. at 463). The defendants argue and we agree that the plaintiffs have failed to establish voting irregularities, such as those enumerated in the Senate Report and *Gingles*, that "enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S.

at 45 (citing S. Rep. No. 97-147, at 29, 1982 U.S.C.C.A.N. at 206-07).

(g) *Other Totality Factors*

The plaintiffs argued that, because of the nature of their packing claim, four of the Senate Factors are irrelevant, including: access to the candidate slating process, racial appeals in political campaigns; the number of minorities elected to public office; and the responsiveness of elected officials to minority needs. We believe these factors are relevant and that our analysis suggests that Hispanics in the districts at issue in this claim and the surrounding areas are not denied equal opportunity to participate in the political process. As the defendants rightly point out, there is little or no evidence that the more overtly invidious factors, such as denying minorities access to the slating process and employing racial appeals in campaigns, are present. More importantly, the number of Hispanics elected to state and local office has risen substantially over the past decade (*see* Stip. ¶¶ 141, 143-45),[146] and Sen. Paterson conceded that Sen. Velella has been responsive to the needs of black and Hispanic citizens in his district (SD 34) and is well liked in the minority community (Tr. at 519-20).

We therefore conclude, based on the totality of the circumstances, that there is no evidence that Hispanics in the relevant area are prevented from participating in the political

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[146] The parties have stipulated that:

• A 2002 report of the Joint Center for Political and Economic Studies reported that there was a jump of 332 percent in the number of black elected officials in New York State from 1970 to January 2000.

• With respect to Hispanics, the number with seats in the legislature has doubled over the past dozen years--a jump from 5 to 10 seats in the Assembly and from 2 to 4 in the Senate. There are currently nine Hispanic members on the New York City Council, and two Hispanics are members of the United States House of Representatives--Nydia Velazquez and Jose Serrano.

• Under the Senate Plan, the number of minority New York State senators has risen from 12 (8 black and 4 Hispanic) to 13 (9 black and 4 Hispanic).

(*See generally* Stip. ¶¶ 141-45.)

process. Moreover, there is evidence that Hispanics have been able to elect candidates of choice and that their political involvement is growing. And even where they have not been able to elect a candidate of choice--such as in SD 34--the evidence shows that their elected representatives have been responsive.

7. *Conclusion*

For the reasons stated, the plaintiffs have not established by a preponderance of the evidence, under *Gingles*, that Hispanics in the Bronx "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

D. The Statewide Vote-Dilution Claim (Count II)

The second count of the Complaint was a "statewide" section 2 vote-dilution claim. The Complaint alleged that the 2002 Senate Plan was a voting practice or procedure that diluted minority voting strength by drawing fourteen majority-minority districts when additional majority-minority districts could have been created. (*See* Compl. ¶¶ 294-95, 299.) The plaintiffs' theory was that the 2002 Senate Plan systematically underpopulated the upstate districts and overpopulated the downstate districts where the vast majority of blacks and Hispanics in the state reside. (*See* Summ. J. Tr. at 54-55); *cf. infra* Part III (Count I: one-person, one-vote claim). The remedy offered was the creation of an additional majority-minority district in the Bronx-Westchester region--namely, SD 36. (*See* Summ. J. Tr. at 55.) [147]

We granted summary judgment dismissing this claim

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[147]. The claim, as alleged in the Complaint, was based on the Senate Plan's failure to create two additional majority-minority districts (to make sixteen total). (*See* Compl. ¶ 295.) The two additional districts the plaintiffs had contemplated were Proposed District 36 in the Bronx and Proposed District 8 in Nassau County. But as the plaintiffs acknowledged, the upstate-downstate population distribution has no effect on Long Island, and Proposed District 8 is not part of this count. (*See* Summ. J. Tr. at 54.)

because, as the plaintiffs conceded at the summary judgment argument, Count II is duplicative of Count III. (*See id.* at 54-57.) As explained above, Count III also alleged that the upstate-downstate population distribution was a voting practice that lead to the packing of minorities in the Bronx and the failure to create an additional majority-minority district. Both Counts II and III offered the creation of Proposed District 36 in the Bronx as a remedy. The plaintiffs agreed that the statewide section 2 claim was duplicative and that their case would not be harmed by dismissing Count II. (*Id.* at 57.)

E. The LVRC Intervenors: Senate District 31 (Count IV)

In Count IV of the Complaint, the plaintiff-intervenors Latino Voting Rights Committee ("LVRC intervenors") challenged SD 31, as redistricted following the 2000 census. SD 31 is comprised of sections of the Bronx and Manhattan's Upper West Side. SD 31's VAP is approximately 53.2% Latino, 8.0% black, and 33.8% white. (*See* Braatz Decl. Ex. 24 at 5 (Report of Dr. Rodolfo O. de la Garza, dated July 31, 2003 ("De la Garza Report").))[148] SD 31's CVAP is approximately 40.6% Latino, 10.5% black, and 44.9% white. (*See* Netburn Decl. Ex. 4 tbl. 27 (revised).) The district that LVRC intervenors argue should have been created instead, Proposed District 32, substantially overlaps geographically with SD 31 and would have a 61.2% Latino VAP. (*See* de la Garza Report at 8.) Under Proposed District 32, the black VAP would also be increased to 16.3%. (*See id.*)[149] The LVRC intervenors claim that, in choosing SD 31 over Proposed District 32, the defendants violated section 2 of the Voting Rights Act.

While the defendants effectively conceded for the purposes

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[148] Dr. de la Garza used the terms "Latino" and "Hispanic" interchangeably in his report. (*See* de la Garza Report at 3 n.3.) While we have used the label "Hispanic" throughout this opinion, we will generally use the label "Latino" for this count to reflect the terminology used most often by the LVRC intervenors.

[149] There is no suggestion in this claim that blacks and Latinos vote cohesively in either SD 31 or Proposed District 32.

of this claim the substance of the first two *Gingles* preconditions--the majority-in-a-district and cohesion requirements--the LVRC intervenors have failed to adduce sufficient evidence to meet the third *Gingles* precondition. They have not presented evidence that would enable them at trial to show that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate" in SD 31. *Gingles*, 478 U.S. at 50-51. In addition, they have failed to offer a reasonable standard against which we could usefully measure any dilutive effect of SD 31.

The LVRC intervenors' claim cannot survive summary judgment because the information provided by their expert is incomplete and insufficient to address specific aspects of the third *Gingles* factor. The racial bloc voting report prepared by the plaintiffs' expert provides the share of votes given by Latinos and "non-Latinos" to the candidates in each election analyzed. (*See generally* de la Garza Report at 11-13.) However, the report does not give the total vote shares for the candidates. That is, the report does not explain who won in SD 31 for each election. It does not state whether the Latino-preferred candidates were "defeated" within the districts. Even if there were racially polarized voting, the report does not speak--one way or the other--to the effects of the polarized voting.

This omission in the analysis is compounded by others. For example, the LVRC intervenors provided no estimates of the turnout rates of the various groups of voters. Without turnout rates, it is impossible to deduce the results in SD 31 for the various elections. More generally, turnout-rate information is relevant to whether whites--despite not being a majority of the VAP or CVAP in SD 31--can "outvote" Latinos with the "usual" regularity required to satisfy third *Gingles* precondition. The LVRC intervenors also failed to provide estimates of how blacks vote in SD 31 (or would vote in Proposed District 32). Instead they simply grouped blacks and whites as "non-Latinos." Knowing how blacks vote separately from whites is also relevant to determining whether white bloc voting, as opposed to black and white combined voting, usually defeats

the Latino candidate in SD 31. In sum, the LVRC intervenors' analysis examines racially polarized voting without addressing the specifics of the third *Gingles* factor, which requires *white* majority bloc voting that *usually defeats* the Hispanic-preferred candidate. *See Gingles*, 478 U.S. at 49. The failure to provide the necessary information warrants dismissing the LVRC intervenors' claim on summary judgment. It is their burden to adduce evidence sufficient to satisfy the third *Gingles* precondition, and they plainly would not be able to prove their claim at trial based on the evidence provided. *See Gingles*, 478 U.S. at 46.

The LVRC intervenors' theory is that Latino candidates are consistently defeated in the primary stages of elections, thus forcing Latinos to vote for their second preference in the general elections. Having framed the inquiry as such, Dr. de la Garza based his analysis primarily on local exogenous primary elections and one endogenous primary election--all involving a Latino candidate. (*See id.* at 11-14.) Although endogenous elections are the generally considered most probative for racial bloc voting analysis, the evidence is largely limited to exogenous elections. *See, e.g., NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015 n.16 (2d Cir. 1995); *Clay v. Bd. of Educ.*, 896 F. Supp. 929, 940 (E.D. Mo.1995).[150]

To show racial bloc voting against Hispanic-preferred candidates, Dr. de la Garza's report first cites the 1993 Democratic primary for Public Advocate, which involved five candidates. (*See* de la Garza Report at 11, 13 tbl. 6.) For that election, the purportedly "Latino-preferred" candidate, Puerto Rican Roberto Ramirez, commanded the plurality support of

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[150] SD 31 was essentially created anew in the 2002 Senate Plan, drawing 39.40% of its population from the 1990s SD 28; 39.15% of its population from the old SD 30; 21.35% of its population from the old SD 29; and 0.10% of its population from the old SD 34. (Braatz Decl. Ex. 13.) Thus the only endogenous Senate election for SD 31, as it currently exists, was in 2002. Dr. de la Garza analyzed the local exogenous primaries based on the precincts that are now encompassed in the current SD 31. He did not analyze endogenous State Senate elections for the portions of SDs 28, 29, and 30 that now constitute SD 31.

42% of the Latino vote in SD 31, and Mark Green was the "non-Latino preferred candidate," receiving 63% of the non-Latino vote. (*Id.*) While the election shows some signs of racially polarized voting, the LVRC intervenors' labeling of Ramirez as the "Latino candidate of choice" is highly questionable. Not only did 24% of Latinos in SD 31 support Green, but also a full 58% of Latinos in SD 31 supported candidates other than Ramirez. Therefore, it is difficult to say that Ramirez's defeat in SD31--assuming he was defeated [151]--is attributable to white bloc voting rather than the lack of cohesive support from Latinos. The ambiguity of this election is only increased by the failure to provide information such as the ultimate results in the district, the race/ethnicities of the other candidates, and the rates at which blacks and whites separately supported the different candidates.

The second election that the LVRC intervenors offer in support of their claim is the 1993 Democratic primary for City Comptroller. (*See id.* at 11, 13 tbl.7.) In that primary, Herman Badillo, a Puerto Rican who, at various times during his political career, has been both a Republican and a Democrat, received 55% of the Latino vote. (*Id.*) The non-Latinos split their vote: 43% favored Alan Hevesi, who was ultimately successful citywide in the primary and general election, 28% favored Elizabeth Holtzman, and 27% favored Badillo. (*See* id. at 11, 13 tbl.7.) We note that 31% of Latinos favored Holtzman in that race as well. In sum, this election also does not show any clear evidence of racial bloc voting defeating the Latino-candidate of choice in SD31. As was true in the Public Advocate primary for SD 31, Latinos did not coalesce around their "candidate of choice" in overwhelming numbers, and non-Latinos supported Badillo at a rate equal to another white candidate. Moreover, we do not even know that Badillo was "defeated" within SD 31. Dr. de la Garza's report does not provide the results for SD 31 nor does he provide turnout rates

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[151]. It does not say in Dr. de la Garza's report that Ramirez failed to receive the most votes in the areas constituting the current SD 31, but the numbers strongly suggest that he did.

that would allow us to deduce the results. This is a glaring example of how incomplete information provided by the LVRC intervenors undermines their ability to establish their claim.

The same omission vitiates the probative value of the 2001 mayoral primary and mayoral runoff elections involving Ferrer, a Hispanic candidate, and Green. (*See id.* at 11-12, 13 tbl.9, 14 tbl.10.) The LVRC intervenors suggest that voting within SD 31 was racially polarized for those elections because Latinos overwhelmingly favored Ferrer and non-Latinos favored Green. But again, Dr. de la Garza fails to report whether Ferrer was "defeated" by Green in SD 31. Therefore, these elections, on their face, are not evidence that white bloc voting usually defeats Latino candidates of choice in SD 31.

The only probative evidence of racially polarized voting defeating the Latino candidate of choice comes from the 2002 Democratic primary race for State Senator for SD 31. In that election, Guillermo Linares, a Dominican Latino and former City Councilman who had represented the Washington Heights area for over ten years (*see* Chin Aff. ¶ 29), received the support of 81% of the Latino vote. (De la Garza Report at 12, 14 tbl.11.) But Eric Schneiderman, a white incumbent State Senator,[152] won the election with 88% of the non-Latino vote. (*Id.*) Putting aside Schneiderman's incumbency advantage and the fact that this election took place post-litigation, to the extent that this single election manifests racially polarized voting defeating the Latino-preferred candidate, it is insufficient to raise a genuine issue of material fact that would enable the LVRC intervenors to satisfy the third *Gingles* precondition.

Moreover, the LVRC intervenors sought in the first instance to prove a proposition that is insufficient to show that the third *Gingles* factor had been met: the LVRC intervenors' expert, Dr. de la Garza prepared his report to answer the

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[152] As explained *supra* note 150, SD 31 was essentially created anew by the 2002 Senate Plan, but Schneiderman was the incumbent for the predecessor district, which encompassed the areas of the Upper West Side and Riverdale that constituted substantial portions of the 2002 SD 31. (*See* Chin Aff. ¶ 29.)

question, "[C]an Latinos elect their candidates of choice *when their most preferred candidate is a Hispanic candidate?* " (*Id.* at 5 (emphasis added).) The answer to the question posed by the report is only part of the picture. It is also important to know whether Latinos can elect their candidates of choice when their preferred candidate is not Hispanic. This is so because in New York Latinos do not always prefer Hispanic candidates, even when Hispanics are in the race. For example, Dr. de la Garza's report mentions but discounts the Democratic mayoral primaries of 1993 and 1997, where, in each, there was a Latino candidate, Eric Ruane-Melendez, who was not preferred by the Latino electorate. (*See* de la Garza Report at 11, 12 tbl. 5, 13 tbl. 8.) In 1993, the Latino-preferred candidate was a black candidate, David Dinkins; in 1997, the Latino-preferred candidate was a white candidate, Ruth Messinger. Both Dinkins and Messinger received higher percentages of the Latino vote than the presumptive "Latino-preferred" candidates in the Public Advocate and the City Comptroller races, which were offered to show racial bloc voting. While the LVRC intervenors assert that in "a few anomal[ous] races ... both the Latino VAP and non-Latino VAP majorities supported white candidate[s]" (*see* Chin Aff. ¶ 30), they do not explain why these elections are anomalous.

In sum, the LVRC intervenors asked the wrong question and provided insufficient and incomplete evidence in answering it. The question is not whether Latinos can elect a preferred candidate who is Hispanic, but a preferred candidate period. If Latinos often prefer non-Latino candidates, LVRC intervenors cannot meet the third prong of *Gingles* by showing only that racial bloc voting defeated a Latino candidate of choice in one instance when that candidate of choice was Latino. Even being as generous as possible to LVRC intervenors, despite the fact that it is their burden to show the third *Gingles* factor, no reasonable person could conclude from these analyses that a *white* majority *usually defeats* the minority's preferred candidate as required by *Gingles*. *See Gingles*, 478 U.S. at 49.

Finally, regardless of the insufficiency of their racial bloc voting analysis, the LVRC intervenors' claim must be dismissed because the LVRC intervenors have failed to provide "a hypothetical alternative" that would enable us to assess whether the 2002 Senate redistricting plan "results in a denial or abridgement of the right of any citizen ... to vote on account of race or color." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000). LVRC intervenors propose only a single district that they claim the Senate should have drawn as part of a 61-seat plan. They do not propose an alternative redistricting plan for the entire state or propose an alternative with a 62-seat plan in mind. Here, it was incumbent upon them to have done so.

To be sure, the plaintiffs in a lawsuit such as this need not perfectly design an airtight alternative that is beyond reproach; they need only present a "reasonable" idea as a baseline. *See, e.g., Holder v. Hall*, 512 U.S. 874, 880 (1994). And generally, when the challengers, as here, propose a single alternative district, it enables a court to assess whether the first two *Gingles* preconditions have been met; whether the new district would contain a majority of minority members; and whether there would be cohesion among the minority voters in the newly proposed district. *See, e.g., Sanchez v. State of Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996). However, we agree with the defendants that in this case, where the lead plaintiffs challenge many different aspects of the Senate Plan and provide an alternative of their own--one that does not embrace the intervenors' alternative--the hypothetical alternative offered by the intervenors must be more complete than the offering of a single district to serve as the relevant baseline for their Section 2 claim. The main plaintiffs' Revised Plan in this case does not adopt Proposed District 32 as part of their hypothetical alternative, and their main expert, Dr. McDonald, does not himself include SD 31 in his list of districts that reflect racially polarized bloc voting. Thus, here, where LVRC intervenors proposed only a single alternative district and their expert performed his analyses by comparing only the current SD 31 and Proposed District 32 without attention to how other

adjacent districts and the 62-seat scheme would be affected, we cannot entertain the claim.

For all the foregoing reasons, we granted summary judgment dismissing Count IV.

F. The Rivers/Barbour Intervenors: Congressional District 17 (Count VIII)

In Count VIII of the Complaint, plaintiffs-intervenors Rivers/Barbour ("Rivers/Barbour intervenors"), along with the Council of Black Elected Democrats ("COBED"), challenge New York State's redistricting of Congressional District 17 ("CD 17") following the 2000 census. The district is composed of portions of the Bronx, Westchester, and Rockland Counties. The Rivers/Barbour intervenors propose an alternative Congressional District 17 ("COBED-CD 17").

In the current CD 17, the black VAP is approximately 29.32%; the Hispanic VAP is 18.74%; the Asian VAP is 4.64%; and the white VAP is 44.06%. (*See* Hedges Aff. ¶ 8.) In COBED-CD 17, the Rivers/Barbour intervenors argue that the black VAP would be 37.2%; the Latino VAP would be 30.2%; the Asian VAP would be 4.3%; and the white VAP would be 28.0%.[153] (COBED's Rule 56.1 Counterstatement ¶ 360.) The Rivers/Barbour intervenors urge that COBED-CD 17 would provide blacks and Hispanics with more of an opportunity to elect a candidate of their choice and that in choosing CD 17 over COBED-CD 17 the defendants violated section 2 of the Voting Rights Act.

The defendants moved for summary judgment on this claim, arguing, among other things, as follows: (1) The law of the case requires our rejection of this count because we

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153. The defendants count the population of COBED-CD 17 somewhat differently. They find that the non-Hispanic black VAP would be 35.77%, the Hispanic VAP would be 30.20%; the Asian VAP would be 3.75%; and the white VAP would be 26.85%. (*See* Chill Aff. ¶ 25.) The different counts between the parties results from variations in the classifications of individuals who identify with more than one race in response to census questions. For the purposes of the summary judgment motion, we assume that the Rivers/Barbour intervenors' numbers are correct.

previously approved a very similar CD 17 developed by our Special Master, Fredrick Lacey, before his plan was superceded by the legislature's enactment. The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). (2) The COBED-CD 17 remedy would violate *Shaw v. Reno*, 509 U.S. 630 (1993) because the shape of the proposed district would be irregular and drawn for predominantly racial reasons. (3) The Rivers/Barbour intervenors cannot meet the second *Gingles* precondition for their claim because (a) neither blacks nor Hispanics would constitute a majority unto themselves and (b) they may not be grouped together for Section 2 analysis because the two separate minorities cannot be shown to vote cohesively as one.

We decline to rule on the first two of the defendants' arguments because we find the defendants' third argument to be dispositive and to require that this count be dismissed on summary judgment. It is undisputed that under COBED-CD 17 no single minority group would constitute a majority of the population. Instead, the Rivers/Barbour intervenors propose to meet the first *Gingles* requirement by aggregating the VAPs of blacks and Hispanics within COBED-CD 17. This claim thus raises the same minority-coalition claim issues raised by the Bronx vote-dilution claim. *See Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 279 (2d Cir.) (accepting evidence of black and Hispanic cohesion but noting that "[i]t is preferable to create majority districts for each [minority] group"), *vacated on other grounds*, 512 U.S. 1283, (1994); *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989). As we did in Count III, while we assume that minority groups may be aggregated to meet the *Gingles* preconditions, the plaintiffs-intervenors must show that the minority groups are politically cohesive for voting purposes. *See Growe v. Emison*, 507 U.S. 25, 41 (1993). Indeed, the Supreme Court has instructed that, when voting rights claims are based on a combination of distinct ethnic and language minority groups, "proof of

minority political cohesion is all the more essential" and must be held to a "higher-than-usual" standard. *Id.; see also Page v. Bartels*, 248 F.3d 175, 197 (3d Cir. 2001). However, the Rivers/Barbour intervenors, like the plaintiffs in other claims, have failed to meet their burden in showing that blacks and Hispanics are politically cohesive in CD 17 or COBED-CD 17. They have thus failed to adduce evidence sufficient to withstand summary judgment.[154]

In this case, the Rivers/Barbour intervenors sought to make their prima facie case through their expert, Frank Lewis, who analyzed four interracial Democratic primaries: the 1997 New York City primary for Mayor, the 2000 Congressional primary for CD 17, the 2001 primary for Mayor, and the 2001 primary for City Comptroller. (*See* Chill Aff. Ex. O ("Lewis Report").) The Rivers/Barbour intervenors summarize their results as follows: "In each of these elections, Blacks and Hispanics in statistically material numbers voted for the same or another minority preferred candidate, rather than ... the candidates preferred by the White voting bloc within Congressional District 17." (*See* Gibbs Aff. ¶ 59.)

Even accepting this conclusion, we find that Rivers/Barbour intervenors still fail to demonstrate cohesion, much less the high standard of political cohesion required for minority-coalition districts. To be cohesive, blacks and Latinos must have the same preferred candidate; it is insufficient that they, "in statistically material numbers" (whatever that may mean), "vote[ ] for the same *or another* minority preferred candidate," (*See id.* (emphasis added).) Plainly, there is no black-Hispanic cohesion if blacks tend to vote for black

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154. To the extent that the Rivers/Barbour intervenors argue in the alternative that COBED-CD 17 should be construed as a black or Hispanic "influence district," we do not find such claims cognizable under section 2 of the Voting Rights Act, as we have explained with respect to the Suffolk County claim. Moreover, here, it is not even clear which minority group should be construed to have the relevant influence, blacks or Hispanics, or what percentage of the VAP would satisfy the "influence" claim. Finally, the Rivers/Barbour intervenors did not offer any evidence of either group's "ability to elect" on its own.

candidates and against Hispanic candidates, and if Hispanics vote for Hispanic candidates and against black candidates. It cannot be sufficient for the purposes of cohesion merely that both groups vote *against* whichever candidate is preferred by whites if the two groups do not generally vote cohesively *for* the same candidate.[155]

The Rivers/Barbour intervenors' insufficient conclusions were the only ones supported by the data produced by their own expert, Frank Lewis. In the 1997 mayoral primary, 62.7% of blacks and 30.3% of Hispanics supported the black candidate, Reverend Al Sharpton. (*See* Lewis Report at 5.) However, the crucial fact that the Rivers/Barbour intervenors omit (*see* Gibbs Aff. ¶ 60) is that 48.5% of Hispanic voters supported the white candidate, Ruth Messinger, who was also supported by 52.5% of white voters. (Lewis Report at 5.) In the CD 17 Democratic primary in 2000, 48.3% of blacks and 30.3% of Hispanics supported black candidate Larry Seabrook. (*Id.*) However, 49.5% of Hispanics supported the white candidate, Eliot Engel, who was supported by 86.4% of white voters. Moreover, while 24.8% of Hispanics supported Zayas, the Hispanic candidate, only 10.8% of blacks supported Zayas compared to 40.9% of blacks who supported Engel. In the 2001 City Comptroller race, 81.7% of black voters and 38.7% of Hispanic voters supported a black candidate, William Thompson. (*Id.*) Again, the Rivers/Barbour intervenors neglect to mention that 61.3% of the Hispanic voters supported the white candidate, Herbert Berman, who was supported by 69.6% of white voters. (*Id.*) [156]

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[155]. Cohesion could be suggested without blacks and Hispanics preferring the same candidate if, for example, black and Hispanic voters split their votes among two Hispanic candidates while voting against candidates of other races. That situation is not raised by the election results relied on by the Rivers/Barbour intervenors.

[156]. While Hispanics seem more cohesive with whites in these elections, there are also examples of elections where blacks cohere with whites--or at least prefer white-preferred candidates to Hispanic-preferred candidates. For example, in the 1994 congressional Democratic primary between William Colon and Eliot Engel, Hispanics preferred Colon while blacks and whites

The only election analysis to show some level of black-Hispanic cohesion is the 2001 mayoral primary in which the Hispanic candidate, Fernando Ferrer, received the support of 62.7% of black voters and 74.1% of Hispanic voters. (*Id.*) One election, however, cannot establish cohesion among ethnic blocs; the possibility that Ferrer was simply the better candidate looms too large and the strong support from both of the minority groups forced a run-off primary between Ferrer and the ultimate winner, Mark Green, who commanded only 31.4% of white support in the five-contestant race. (*Id.*) We do not consider this limited evidence sufficient to allow the Rivers/Barbour intervenors to survive summary judgment. Three out of four elections show Hispanics preferring white candidates over black candidates. Larry Seabrook—a member of COBED's executive committee, who since 1984 has represented part of CD 17 as an Assemblyman, a State Senator, and a City Councilman, and who lost the 2000 primary race to incumbent Engel—has explicitly conceded that there is no cohesion between blacks and Latinos in CD 17, stating at his deposition that "traditionally Hispanics have basically voted for white candidates, traditionally." (*See* Chill Aff. Ex. P at 80-81 (Tr. of Dep. of Larry B. Seabrook, dated Sept. 11, 2003).) The absence of cohesion sufficient to satisfy *Gingles* 's second factor is fatal to the Rivers/Barbour intervenors' minority-coalition claim regarding CD 17. Without aggregating the black and Hispanic populations, the intervenors cannot satisfy the first *Gingles* precondition.

Accordingly, for the foregoing reasons, Count VIII was dismissed on summary judgment.

V. EQUAL PROTECTION CLAIM: SENATE DISTRICT 34 (COUNT VII)

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preferred Engel. Similarly, in the 2001 Democratic primary for Public Advocate, Hispanics again preferred Colon, but blacks split their vote between two white candidates, Betsy Gotbaum and Norman Siegel. (*See* Chill Aff. Ex. A at 11-17.) These elections, offered by the defendants and ignored by the Rivers/Barbour intervenors in their expert reports, further support the claim that blacks and Hispanics are not politically cohesive in CD 17.

The plaintiffs allege that, in contravention of *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I* "), SD 34 was drawn in 2002 "predominantly on the basis of race," and that the Legislature intended to create "an overwhelming non-Hispanic white majority" district in violation of the Fourteenth Amendment. (Compl.¶¶ 330-31, 334.) The plaintiffs further allege that in drawing SD 34 in 2002 the Legislature subordinated or disregarded traditional districting principles. (*Id.* ¶ 333.) Alternatively, throughout their submissions, the plaintiffs suggest that the alleged racial gerrymander of SD 34 first occurred in 1992 and was continued or preserved in 2002, although they also acknowledge it has never before legally been challenged on *Shaw* grounds. The plaintiffs point to SD 34's "non-compact" shape and to several documents, including, among others, two 1992 court filings in *Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992), as evidence of a racial gerrymander. (Compl.¶ 332.) As set forth in Count III of their Complaint, the plaintiffs' proposed solution is to dismantle majority-white SD 34 in order to create a fifth (out of five) majority-minority coalition district located primarily in the Bronx whose voting age population would be 50.1% Hispanic (45.4% CVAP), 23.0% black, and 19.1% white. (*See* PX 6 tbl. 16.)

The defendants respond persuasively that the plaintiffs have not met the heavy burden of establishing that the New York State Legislature drew SD 34 predominantly on the basis of race. Rather, the record clearly shows that (i) relatively minor changes were made to SD 34 in 2002, principally the addition of the contiguous town of Eastchester in Westchester County; (ii) the configuration of SD 34 in 2002 is largely the same as it was in the 1990s (and the 1980s), with 87.7% of the 2002 SD 34, 641 N.W.2d 656 population coming from 1992 SD 34 (DX 106); and (iii) those changes that were made in 2002 enabled the Legislature to achieve substantial population equality, maintain the core of SD 34's predecessor district, protect the position of SD 34's 16-year incumbent state senator, avoid incumbent pairing, comply with the Voting Rights Act, and help Republicans retain their nearly 40-year-long Senate

majority.[157]

A. Applicable Law

"[A] plaintiff can challeng[e] a reapportionment statute ... by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Shaw*, 509 U.S. at 649. A *Shaw* plaintiff bears the burden of proving that racial considerations were "the 'predominant factor' motivating the legislature's districting decision," *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("*Cromartie I*") (citations omitted), not simply "*a* motivation for the drawing of a majority-minority district," *Bush v. Vera*, 517 U.S. 952, 959 (1996). The plaintiffs' burden is a "demanding" one. *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring) ("I understand the threshold standard the Court adopts ... to be a demanding one."). Indeed, "[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial* disregard of customary and traditional districting practices." *Chen v. City of Houston*, 206 F.3d 502, 506 (5th Cir. 2000) (citing *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)). The court in *Chen* also observed that "the Supreme Court does not believe that the mere presence of race in the mix of decision making factors, and even the desire to craft majority-minority districts, ... alone automatically trigger[s] strict scrutiny." *Id.* Where race and politics overlap, a plaintiff has an additional burden of proof. That is,

> [i]n a case ... where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in

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[157]. Almost all, 96.8%, of the Bronx portion of SD 34 as enacted in 2002 comes from the preexisting portion of SD 34 in Bronx County. (Burgeson Aff. ¶ 32.)

> alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

Easley v. Cromartie, 532 U.S. 234, 258 (2001) ("*Cromartie II*").

A plaintiff's heavy burden of establishing the predominance of race can be met either through direct evidence of the Legislature's purpose or through circumstantial evidence, including, among other things, a district's demographics or shape. *See Shaw v. Hunt*, 517 U.S. 899, 905 (1996) ("*Shaw II*"); *Miller*, 515 U.S. at 916.

If a plaintiff meets its heavy burden of proving racial "predominance," the challenged district is subject to "strict scrutiny," which means that the district must be shown to be "narrowly tailored to further a compelling state interest." *Vera*, 517 U.S. at 976; *see id.* at 977 ("A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles ... may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.' ").

Legislatures are afforded the benefit of a presumption of good faith when they conduct redistricting. *See Chen*, 206 F.3d at 505 ("[Our] review must be understood in the context of the courts' traditional reluctance to interfere with the delicate and politically charged area of legislative redistricting. The [Supreme] Court has clearly indicated that th[e] presumption [of good faith] may impact the assessment in a suit challenging districts as racial gerrymanders." (citations omitted)); *see also Miller*, 515 U.S. at 916 ("The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims

that a State has drawn district lines on the basis of race.").

B. Analysis

Preliminarily, we note that this is an unusual claim because *Shaw* challenges have almost always been directed against majority-minority districts.[158] Indeed, the parties here have not analyzed cases challenging majority-white districts, although there appears to be at least one such case on point. In *Chen*, 9 F. Supp. 2d 745 (S.D. Tex. 1998), *aff'd*, 206 F.3d at 521-22, the court dismissed on summary judgment a claim challenging a majority-white Houston city council district which had been adopted in 1997 and which allegedly "perpetuated" a racial districting structure that was originally enacted in 1991. *See Chen*, 206 F.3d at 514-15, 521-22 ("[W]e cannot say that plaintiffs have carried their burden and made a sufficient showing, either circumstantially or directly, to sustain a finding that race predominated in the districting."). We certainly have found no successful *Shaw* challenge to a district, such as SD 34 here, which has been a majority-white district for over twenty years and which has been served continuously by the same Republican incumbent for the past sixteen years.[159]

1. *Senate District 34*

SD 34 is the only majority-white district of the five districts located entirely or predominantly in the Bronx. Its total population is 311,260. Its VAP is 59.5% white; 20.4% Hispanic; and 13.3% black. SD 34 has been represented by the same

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[158] In *Shaw I*, the plaintiffs challenged two majority-black districts. *See Shaw*, 509 U.S. at 636-37; *see also Vera*, 517 U.S. at 957 (challenging three majority-black and majority-Hispanic districts); *Miller*, 515 U.S. at 907-08 (challenging three majority-black districts); *Clark v. Putnam County*, 293 F.3d 1261, 1265 (11th Cir. 2002) (challenging two majority-black districts); *Diaz v. Silver*, 978 F. Supp. 96, 103-05 (E.D.N.Y.) (challenged district was majority-Hispanic), *aff'd mem.*, 522 U.S. 801 (1997).

[159]. In fact, incumbent State Senator Guy J. Vellela was preceded in office by another Republican, John D. Calandra, who served as State Senator of SD 34 from 1973 to 1986. Sen. Calandra represented SD 33 from 1967 to 1972 and SD 38 in 1966. *The New York Red Book*, *supra* note 78, at 197.

(white) Republican senator, Guy Velella, for the past 16 years–interesting, perhaps, because SD 34 is a predominantly Democratic district in terms of voter enrollment: 50.2% Democrat to 25.2% Republican.[160] Sen. Velella is a senior member of the State Senate and holds the positions of Senior Assistant Majority Leader and Liaison to the Executive Branch, and Chairman of the Senate Standing Committee on Labor. (Burgeson Aff. ¶ 38.)

The geographic core of SD 34 is located in the eastern portion of the Bronx where 70.1% of the voting-age population resides, the balance being in southern Westchester County and parts of western Bronx. SD 34 extends from the southeastern portion of the Bronx to Throgs Neck (where Sen. Velella lives) (Tr. at 919), Country Club, City Island, and Pelham Bay Park, and into Westchester County, where it picks up the towns of Pelham and Eastchester and parts of the cities of New Rochelle, Mount Vernon, and Yonkers. It re-enters the Bronx from the north around Van Cortlandt Park, picking up Bronx areas such as (parts of) Riverdale, Woodlawn, and Belmont. *See* N.Y. State Law § 124 (McKinney 2002); (Beveridge Decl. ¶ 61).[161]

During the 1980s and into the 1990s, another of the five Bronx districts had a predominantly white voting age population. It was represented by a white (Democratic) senator, Abraham Bernstein, who held office from 1961 until his death in 1990.[162] Jeffrey Korman, another white Democrat, succeeded Sen. Bernstein for the next two-and-one-half years. In the redistricting following the 1990 census, this district was eliminated in order to create a third Bronx Hispanic-majority district (Tr. at 936 (Burgeson)), which left SD 34 as the sole Bronx majority-white district. In brief, the history of the other Bronx districts is as follows. Old SD 30 was represented by a

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[160]. For voter enrollment information, see N.Y. State Bd. of Elections, at http://www.elections.state.ny.us/enrollment/enroll.htm (last visited Mar. 14, 2004). The enrollment figures are as of June 27, 2002. (*See also* DX 116-21.)

[161]. The towns and cities of Westchester County covered by SD 34 are individually named in N.Y. State Law § 124 (McKinney 2002).

[162]. *See The New York Red Book, supra* note 78, at 197.

Hispanic (Democratic) senator, Olga Mendez, who was first elected in 1978 and remains in office today. Old SD 32 was represented by a Hispanic (Democratic) senator, Israel Ruiz, from 1975 until 1989. He was succeeded by a Hispanic (Democratic) senator, Efrain Gonzalez, who remains in office today. Old SD 31 (thereafter called SD 33) was represented by a black (Democratic) senator, Joseph Galiber, from 1969 until his death in 1995. He was succeeded by black (Democratic) senators Larry Seabrook and Ruth Hassell-Thompson, who holds office today.

The shape of SD 34, certainly not perfectly compact, appears to have evolved relatively slowly since the 1980s.[163] Following the 1982 redistricting, SD 34 remained predominantly in the Bronx but, for the first time, crossed the Bronx border into Westchester County to include the Westchester towns of Pelham and portions of New Rochelle, Mount Vernon, and Yonkers. The move of SD 34 into Westchester in 1982 contributed to the current curved (or circular) appearance of the northern portion of the district. Following the 1992 redistricting--when the majority-minority black district (old SD 33 and currently SD 36) also moved north of the Bronx border into Westchester County--portions of SD 34, including predominantly black southern Mount Vernon, were added to SD 36. As a result, in 1992, SD 34 made a second crossing into the Bronx from Westchester County (to the west) to include Bronx sections of Van Cortlandt Park and parts of Riverdale, Woodlawn, Wakefield, Norwood, and Belmont, although, in fact, SD 34 at the time had already included sections of the west Bronx along with the Westchester towns of Pelham and portions of New Rochelle, Mount Vernon, and Yonkers. This change appears further to have

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[163]. The record offers only partial evidence of district shape from the 1980s and none for the period before 1980. Senate district maps and statutory contours of each Senate district are published in the *New York State Legislative Manual*, which is prepared by the New York Secretary of State pursuant to N.Y. Executive Law § 95. The 1980s district lines for SD 34 can be found at *New York State Legislative Manual* 831-33 (1986-1987).

accentuated the curved shape of the district.

2. *2002 Redistricting*

The principal population and geographic changes that were made to SD 34 in 2002 are as follows: (1) A net total of 13,889 people were removed from SD 34 to achieve its target redistricting population of 311,260, with the general effect of increasing the white VAP. Approximately 29,528 (nonwhite) persons were moved into other districts in the Bronx and Manhattan (SDs 31, 32, 33, and 36) and into Westchester (SDs 35 and 37), and approximately 15,639 (white) persons were added to SD 34 from other districts in the Bronx and Manhattan (SDs 30, 31, 32, 33, and 36) and Westchester (SD 35), including, particularly, the entire Town of Eastchester (population 31,318).[164] During the 1990s, the white VAP of SD 34 dropped from approximately 69% to 53%. (Burgeson Aff. ¶ 45) SD 34 was redrawn with a 59.5% white VAP. (*See id.*) (2) As noted, in 2002, the Westchester Town of Eastchester became part of SD 34. Other geographic changes included the addition of neighborhoods in Yonkers and the removal of parts of New Rochelle and Yonkers in Westchester, parts of Castle Hill in the southeastern Bronx, and parts of Wakefield, Riverdale, and Norwood, which is in the northwestern Bronx. And (3) the additions of Eastchester and parts of Yonkers comprised the vast majority (nearly 98%) of the additions to SD 34 VAP in 2002--other additions were de minimis. (*See* DX 106.) Stated in other terms, 87.7% of the population of SD 34 in 1992 remained in SD 34 in 2002. (Burgeson Aff. ¶ 32.)

The 2002 redistricting also impacted the four Bronx majority-minority districts:

a. SD 36, the only Bronx majority-black district, which is adjacent to SD 34 and which is sometimes referred to as the "hole" in the SD 34 doughnut, became in VAP terms: 65.2% black, 25.8% Hispanic, and 6.5% white. Compared to its 1992 predecessor (SD 33) under the 2000 census, the black VAP

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164. (*See* DX 106; PX 9 tbl.2; Beveridge Decl. ¶ 53.)

increased by 3.9 percentage points.[165] "Eighty-eight percent of the new District 36 comes from the old District 33, the majority black district that is and was the companion to District 34." (Burgeson Aff. ¶ 34.)

b. SD 28, a Bronx/Manhattan district, became in VAP terms: 54.0% Hispanic, 28.8% black, and 12.9% white. Compared to its 1992 predecessor (also SD 28) under the 2000 census, the Hispanic VAP decreased by 7.4 percentage points.

c. SD 32, a south-central Bronx district, became in VAP terms 58.1% Hispanic, 30.0% black, and 7.2% white. Compared to its 1992 predecessor (also SD 32) under the 2000 census, the Hispanic VAP decreased by 4.2 percentage points.

d. SD 33, a west Bronx district, became in VAP terms 56.7% Hispanic, 23.3% black, and 13.0% white. Compared to its 1992 predecessor (SD 31) under the 2000 census, the Hispanic VAP decreased by 5.3 percentage points.

(*See* PX 27 at 7-11 (LATFOR's section 5 preclearance submission regarding change in demographics for SDs 28, 32, and 33).)

It is, we believe, especially noteworthy in analyzing this *Shaw* claim that all three Bronx Hispanic senators--Sens. Mendez, Espada, and Gonzalez--voted in favor of the Senate Plan as, of course, did Sen. Velella. While Sen. Hassell-Thompson did not vote for the Plan, she testified that she supported the lines that were drawn that would configure her district. (Stip.¶ 107.)

3. *The Plaintiffs' Case*

The plaintiffs point to circumstantial and direct evidence that they contend supports their claim that SD 34 was drawn in 2002 predominantly on the basis of race in disregard of traditional districting principles, including: (a) the shape (non-compactness) and the boundaries of SD 34; (b) the information

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[165] The black VAP increase is based upon the difference between the percentage of blacks in the old and new districts excluding mixed-race responses. The record does not reflect the comparative numbers including mixed-race responses, which are the numbers used elsewhere in this decision.

available to the Legislature before it voted on the Senate Plan; (c) certain written submissions made by (then) Senate Majority Leader Ralph Marino and Mr. Burgeson in 1992 in *Wolpoff v. Cuomo*; and (d) memoranda written by Mr. Burgeson in 2001. We conclude that "[o]n this record, we cannot say that plaintiffs have carried their burden and made a sufficient showing, either circumstantially or directly, to sustain a finding that race predominated in the districting." *Chen*, 206 F.3d at 521.

(a) *Shape and Boundary Lines*

The plaintiffs observe that SD 34 in 2002 "looks something like a doughnut that has had a bite taken out of it and then been run over by a car." (Beveridge Decl. ¶ 50.) While the district contours may be ungainly, it is not the least compact Senate district and, in any case, its shape is relevant only for any light it may shed on the claim here that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 915. We do not find SD 34's shape to be proof of racial districting. For one thing, the shape of SD 34 changed relatively little from 1992 to 2002--or from 1982 to 1992. Its geographic "core" has been in the east Bronx during that entire period. It crossed the Bronx/Westchester border in 1982 when the Westchester town of Pelham and parts of New Rochelle, Mount Vernon, and Yonkers were added to it. The changes to SD 34's contours that have occurred--including what the plaintiffs refer to as the "second" Bronx/Westchester border crossing--reflect changes principally in the adjacent majority-minority black district. So, for example, when the Bronx majority-minority black district first crossed into Westchester in 1992, it did so by picking up a portion of SD 34's Westchester population. The creation of a third Bronx majority-minority Hispanic district in 1992 also impacted the contours of SD 34, extending its western portion into Van Cortlandt Park and Riverdale.

Nor do the compactness measures the plaintiffs have relied upon (*see* PX 6 tbl.12) demonstrate racial predominance.

Two compactness measures presented by the plaintiffs (Reock and Ehrenburg) reflect that SD 34 is close to the average in compactness of all districts in the State. SD 34 is in a tie with SD 16 as the least compact New York district according to only one measure (Polsby-Popper); it is the "second worst" according to two measures (Population Polygon and Schwartzberg tests), where it is behind SDs 14 and 16, respectively; and it is the "fourth worst" behind SDs 14, 51, and 59 according to another measure (Population Circle).[166] Compared to its neighbors in the Bronx, SD 34 is only slightly less compact than SDs 28 and 36. And, SD 34 is hardly less compact than the proposed new majority-minority Hispanic district under the Plaintiffs' Revised Plan based, for example, upon the Reock measure.

The plaintiffs also contend that the addition in 2002 of the (predominantly white) Town of Eastchester to SD 34 and an analysis of the borders and border crossings of SD 34 indicate that the boundaries of the district were changed to track racial residential patterns. Dr. Beveridge, the plaintiffs' expert, testified that "[f]our-fifths (31,318) of the people added [on a gross basis] to District 34, and 99.66% of those added from Westchester, were added as a single indivisible unit, the Town of Eastchester" where the VAP is 85.7% white, 2.7% black, and 4.1% Hispanic. (Beveridge Decl. ¶ 53.) The plaintiffs' position is not compelling with regard to Eastchester because, among other things, that community was already contiguous to the Mt. Vernon portion of SD 34 at the time it was added and because Eastchester accounts for a relatively small portion (9.8%) of the SD 34 VAP. (*See* DX 73.) And, as the plaintiffs themselves acknowledge, under the New York State Constitution, Eastchester could only have been added as an entire indivisible unit. *See* N.Y. Const. art. III, § 4 ("No town, except a town having more than a full ratio of apportionment ... shall be divided in the formation of senate districts.").[167]

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[166]. The seventh compactness measure, called the sum of perimeters, is not meaningful in this context.

[167] "The racial composition of the Westchester portion changed to a slightly

The fact of a double border crossing by District 34 is, as noted, attributable largely to changes in 1992 in the contours of SD 36, the adjacent Bronx majority-minority district.[168] With respect to block by block comparisons, the plaintiffs present maps showing the white VAP by block in SD 34 in 1992 (PX 4) and 2002 (PX 3), but they do not provide a complete analysis of particular block-by-block changes. A (visual) comparison of the two maps presented appears to show both changes that may relate to the number of whites in the district and also changes that do not appear to reflect such correlation. *See Chen*, 206 F.3d at 509. The defendants point out, moreover, that most of the population that was moved out of SD 34 in 2002 was moved into three of the Bronx majority-minority districts, namely, SDs 32, 33, and 36 (*see* DX 106), which presumably enhanced the ability of minorities to elect representatives of their choice. "[W]e simply cannot find that the challenged shape of the districts here offers adequate evidence that race predominated in the districting." *See Chen*, 206 F.3d at 509.

The plaintiffs also contend that the shape and boundaries of SD 34 violate provisions of the New York State Constitution relating to compactness and county border crossings. N.Y. Const. art. III, § 4 ("[D]istricts shall be so readjusted or altered that each senate district shall ... be in as compact form as practicable ... and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county."). We have described above the plaintiffs' compactness arguments. As to border crossings, the plaintiffs point out that there are five county crossings in the Bronx under the Senate Plan. SD 34, as noted, crosses the Bronx/Westchester border twice; SD 36 crosses the Bronx/Westchester border once; and SDs 28 and 31 both cross

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greater degree, but this was simply through the transfer of a white town (Eastchester) from one majority-white district to another." (Burgeson Aff. ¶ 46.)

168. "The shape of District 34 in the 1990s was affected by the shape of the majority black Bronx-Westchester district drawn adjacent to District 34, which empowered black voters." (Burgeson Aff. ¶ 42.)

the Bronx/Manhattan border once. (DX 2.) [169]

Neither county-border crossings nor compactness, under New York law, are absolutes. We find that the district is not out of step with New York jurisprudence and that these very issues were considered in 1992 by the New York State Court of Appeals in *Wolpoff*, which upheld the 1992 Senate plan. *Wolpoff* involved State constitutional challenges by Bronx voters to the 1992 State Senate redistricting plan, and included challenges to the Bronx County Senate districts at issue in this case. *Wolpoff*, 80 N.Y.2d at 75-76. The plaintiffs in *Wolpoff* alleged, among other things, that "the Senate redistricting plan unconstitutionally fragments Bronx County into six separate Senate districts, only two of which are contained wholly within Bronx County, despite the fact that by virtue of population, Bronx County could support only four wholly self-contained Senate districts." *Wolpoff*, 80 N.Y.2d at 75. The *Wolpoff* plaintiffs also alleged that the plan "creates districts that are neither compact nor contiguous," *id.* at 76, and that under the 1992 Senate plan, border crossings "compromise[d] the integrity of 23 counties." *Id.* at 80.

The trial judge in *Wolpoff* was persuaded by the plaintiffs' arguments and held that the Senate plan " 'excessively, gratuitously and without supervening need dictated by federal law, disregards the integrity of county boundaries in the creation of Senatorial districts.' " *Wolpoff*, 80 N.Y.2d at 76. The Court of Appeals reversed. It reviewed the New York Constitution provision at issue which states that " 'each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and ... shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county.' " *Id.* at 77 (quoting N.Y. Const. art. III, § 4). And, it framed the issue as follows:

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[169] In fact, at least two districts have crossed the Bronx County border since 1972. *See New York State Legislative Manual* 962-63, 966-67 (1973) (SDs 30, 35); *id.* at 829-33 (1986-1987) (SDs 30, 34); (DX 6 (SDs 28, 30, 33, and 34 (twice))).

> [W]e examine the balance struck by the Legislature in its effort to harmonize competing Federal and State requirements. The test is whether the Legislature has "unduly departed" from the State Constitution's requirements regarding contiguity, compactness and integrity of counties (*Matter of Schneider v. Rockefeller*, 31 N.Y.2d 420, 429, 340 N.Y.S.2d 889, 293 N.E.2d 67 [(1972)]) in its compliance with Federal mandates.... "Our duty is ... to determine whether the legislative plan substantially complies with the Federal and State Constitutions" (*id.*, at 427, 340 N.Y.S.2d 889, 293 N.E.2d 67). A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional " 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " (*Matter of Fay*, 291 N.Y. 198, 207, 52 N.E.2d 97 [(1943)]).

Wolpoff, 80 N.Y.2d at 78.

The Court of Appeals determined that the defendants had "put forth more than enough evidence to support [their] argument that any such [county crossings and compactness] violation was minimized and that the district lines were drawn as they were in order to comply with Federal statutory and constitutional requirements." *Id.* at 79-80.[170] It concluded that

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[170] The Court also observed that "[t]he Majority Leader [Sen. Marino] has marshaled a considerable amount of statistical and demographic data to support his contention that these districts were drawn in a 'good faith effort' (*Matter of Schneider v. Rockefeller, supra*, at 428) to comply with *Reynolds v. Sims* and the Voting Rights Act and not for partisan political reasons, as petitioners

"[a]lthough we are troubled by the number of divided counties ..., [w]e are satisfied that in balancing State and Federal requirements, the [State] has complied with the State Constitution as far as practicable ...." *Id.* at 80. The Court also considered the plaintiffs' compactness and contiguity claims and found them "to be without merit." *Id.*

Wolpoff appears to us to have confirmed the appropriateness of border crossings in the 1992 Senate plan and, to some extent at least, also the "compactness" of SD 34 under New York law. The holding in *Wolpoff* also negates the plaintiffs' argument that the defendants in this case have disregarded traditional State districting principles in fashioning SD 34.[171]

(b) *Information Available to the Legislators in 2002*

The plaintiffs contend that before the 2002 Senate Plan came up for a vote, only limited information (presumably "racial, but not political or socio-economic data") had been supplied to the legislators. (*See* PX 48.) Sen. Paterson, himself a named Defendant in this case, testified for the plaintiffs that

> [i]n early April 2002, a booklet was delivered to the offices of every member of the Senate and Assembly titled, "Proposed Senate and Assembly District Lines 2002, Revised Effective April 7." The booklet contained a map of every proposed Senate and Assembly district in the redistricting bill that was endorsed by [LATFOR] and approved by the Legislature that week. It also contained census data for each proposed district: total population, deviation from the ideal population, and both population

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argue." *Wolpoff*, 80 N.Y.2d at 78-79. It would be an unsustainable leap of logic to conclude from these remarks in *Wolpoff* that the defendants here are estopped from arguing that politics played a role in the 2002 Senate districting processes. (*See* PFF ¶¶ 685-86.)

[171] "That an alternative plan might have been devised that conflicted less with article III, § 4 but did greater violence to the equal representation principle is no basis for rejecting the Senate plan. Further, we cannot focus solely on the challenged districts and ignore the fact that a redistricting plan must form an integrated whole." *Wolpoff*, 80 N.Y.2d at 79.

> and voting-age population broken down by race and Hispanic origin. The booklet provided no census data about any other population characteristics than race, and no data other than the census data. The booklet and the bill setting forth the metes and bounds of the districts ... were the only information about the proposed districts distributed to the members of the Legislature before we voted.

(Paterson Decl. ¶¶ 12-13.) The defendants respond by pointing out, among other things, that extensive "political information ... was available to Senators and their aides on the [LATFOR] computer system." (Burgeson Aff. ¶ 40.) The transcript of the Senate floor debate prior to passage of the Senate Plan also indicates that individual legislators were informed about the redistricting process:

> As ten years ago, we did try to meet with individual[senators] and work with them so that we could make sure the districts again best represented your constituents.... In this redistricting, [LATFOR] had the opportunity on numerous occasions to meet with individual members at their request, and certainly no individual, whether a member of the Majority or the Minority, was denied their opportunity to speak either with me, ... with Senator Bruno, with Mark [Burgeson].... We made all our resources available. And a number of members attended [the public] meetings and met with us: Senator Mendez, Senator Gonzalez, Senator Sampson, Senator Carl Kruger, Senator Gentile, Senator Santiago, Senator Malcolm Smith, Senator Toby Stavisky, among others. So I thank you for your participation.

(DX 134 at S 1350-51 (testimony of Sen. Skelos).) Specifically, "[a]t the Task Force public hearing in Bronx County, extensive testimony was given ... that, regardless of the unusual shapes of the two districts [SDs 34 and 36], the area had received

superior representation by the two senators representing Bronx/Westchester and the community endorsed that continuation." (Burgeson Aff. ¶ 36.)[172]

The "booklet" referred to by Sen. Paterson hardly establishes the plaintiffs' heavy *Shaw* burden of proving racial predominance. For one thing, it includes information relating to district population and population equality including deviation from the ideal. Equality of population is a constitutional requirement and, in and of itself, a fundamental districting principle. *See Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1054 (D. Md.1994) (three-judge court). The booklet also describes each district's metes and bounds and VAP, including demographic breakdowns. This information is unobjectionable and the presence of racial information does not render the decisionmaking suspect. *See Chen*, 206 F.3d at 502 ("[T]he mere presence of race in the mix of decision making factors ... does not alone automatically trigger strict scrutiny."). In view of the series of hearings, meetings and public comment (and website material) that preceded the LATFOR proposals--and the normal dialogue expected to occur between and among politicians whose districts were up for renewal--it would be naïve to suggest that all of New York's assemblypersons and senators were unaware of the political import and stakes, and details, of the 2002 redistricting.[173] And, in light of the fact that most New York

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[172] The defendants have also presented written materials, including transcripts from several LATFOR public hearings and meetings (DX 126-28, 131-33) and the Assembly and Senate floor debates (DX 134), which took place prior to passage of the Senate Plan. Sen. Skelos and Democratic members of LATFOR spoke at these meetings.

[173] The defendants argued at the summary judgment stage that "[s]ince there is a blazingly obvious political explanation for the legislature's District 34, the plaintiffs cannot show that it is unexplainable on this political ground and, since the political explanation is so blazingly obvious, no member of the legislature needed to be handed political data to know the legislature's District 34 was better for Senator Velella than the overwhelmingly Democratic Hispanic majority district (and, in any event, all such political data was readily available on LATFOR's website)." (Defs. Reply at 15.)

senators and assemblypersons are incumbents, it is also difficult to imagine, let alone conclude, that they were unaware of any other data and characteristics about their existing and proposed constituents.[174]

(c) *Wolpoff Case Submissions*

The plaintiffs also cite to excerpts from (then) Republican Senate Majority Leader Marino's June 22, 1992 portion of a brief submitted in *Wolpoff* (PX 31) and an affidavit of Mr. Burgeson, dated June 8, 1992, also submitted in the *Wolpoff* case (PX 30), as evidence of racial predominance.[175] The plaintiffs offer Sen. Marino's section of the 1992 *Wolpoff* brief to suggest that SD 34 in 1992 (and presumably also in 2002) was configured with the purpose of including as much as possible of the white population of the Bronx without exceeding permissible population limits. (Beveridge Decl. ¶ 39.) The brief states, in part, that: "The other county crossing in the Bronx, District 30, united the white concentrations in the Northwest Bronx with the west side of Manhattan. This crossing is necessary to avoid diluting minority voting strength and to maintain population equality. Not all of the white residents in the Bronx can reside in District 34 because the district would then exceed permissible population limits." (PX 31 at 61 n.19.) We do not conclude from this that SD 34 was a racial gerrymander in 1992. That is, we read the Marino portion of the State's 1992 brief as demonstrating that Sen. Marino and the Legislature in 1992 sought to enhance minority

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[174] In 2002, 54 of the 56 incumbent senators who sought reelection won. In addition, because the Senate Plan paired two incumbent Democrats in SD 23, one senator ran for the "open" seat in SD 22 and lost. *See* N.Y. State Bd. of Elections, 2002 State Senate General Elections Results, *at* http://www.elections.state.ny.us/elections/2002/general/2002_sen.pdf (last visited Mar. 3, 2004); (DX 93 (listing incumbents assigned to each district under 2002 Senate Plan)); *see also Martinez v. Bush*, 234 F. Supp. 2d 1275, 1307 n.36 (S.D. Fla. 2002) (three-judge court) (taking judicial notice, pursuant to Fed. R. Evid. 201(b)(2), of election results posted on Florida Department of State website).

[175] Burgeson, who testified in this case as one of the defendants' experts, has been employed by the LATFOR Task Force (or the Senate majority offsite redistricting office) since 1980.

voting strength in accordance with the Voting Rights Act and to achieve population equality in accordance with *Reynolds v. Sims*, 377 U.S. 533 (1964), which are lawful districting objectives. *See Marylanders*, 849 F. Supp. at 1035 n.11, 1054; *cf.* 42 U.S.C. § 1973.

The plaintiffs cite the 1992 affidavit of Mr. Burgeson also to suggest that SD 34 in 1992 (and presumably also in 2002) was a racial gerrymander. In 1992, Mr. Burgeson stated: "It is impossible to create four districts wholly within Bronx county and still comply with the Voting Rights Act. In order to create districts in which minority voters comprise a majority of the [VAP], it is necessary to both remove white voters that would dilute minority voting strength, and place together concentrations of minorities." (PX 30 ¶ 11(a).) [176] And, after describing the creation of the four Bronx majority-minority districts in 1992, Mr. Burgeson explained:

> These districts left areas of white concentrations in the Bronx.... District 34 unites the white concentration in the northwest Riverdale section of the Bronx with the white section on the east side of the Bronx. It was necessary for District 34 to unite the white concentrations on the east and west sides of the Bronx by going north into Westchester County, to avoid cutting off the black communities in the North Bronx and in Mount Vernon from the rest of District 33.

(*Id.* ¶ 11(d).) "It is my understanding that the Voting Rights

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[176]. The plaintiffs also contend that in 1992 the Senate majority was following a "maximization policy" that the Supreme Court would later criticize in *Miller*, 515 U.S. at 920-27, and other decisions, by pointing out that Mr. Burgeson's 1992 affidavit notes that a 1992 goal was to "[e]stablish, to the extent possible, districts in which minorities comprise a majority of the voting age population, as required by the Voting Rights Act." (PX 30 ¶ 3(b); *see also* PX 31 at 15, 52-58.) We do not believe the quoted remarks establish a 1992 legislative "maximization policy" or racial predominance.

Act does not permit respect for county lines to dilute minority voting strength in this way." (*Id.*)

Again, we do not read racial predominance into Mr. Burgeson's 1992 affidavit. Rather, we infer a good faith attempt to comply with the Voting Rights Act and to respect, as much as possible, state constitutional principles relating to border crossings. *See Chen*, 206 F.3d at 520 ("[A]ccepting the plaintiffs' minimal showing here would ... in practice narrow what is already a difficult passage through the Scylla of the Voting Rights Act and the Charybdis of *Shaw* nearly to the vanishing point--virtually every decision the jurisdiction made would run aground on the rocks of litigation.").

The plaintiffs argue that "neither the [1992] Burgeson affidavit nor the [1992] Marino brief offered any non-racial explanation for the configuration of District 34, such as the preservation of the cores of existing districts, partisan advantage, or avoiding the pairing of Republican incumbents." (Beveridge Decl. ¶ 41.) The defendants counter that there is no evidence that SD 34 in the 1990s reflected a purpose to create a white district, rather than to accommodate the neighboring majority-black district. (*See* Tr. at 278-88 (Beveridge)). During a colloquy with the Court at trial, defense counsel further explained the 1992 Burgeson affidavit and the *Wolpoff* brief (which counsel helped prepare) this way: "Everything Mr. Burgeson and I said in 1992 had nothing to do with the purpose behind District 34. It was explaining why, after you have created the districts mandated by the Voting Rights Act, this left over district has to be constructed in this way ...." (Tr. at 917-18.) [177]

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[177] The Senate redistricting plans of 1992 and 2002 were submitted to the Department of Justice for preclearance, and both times the three majority-Hispanic, one majority-black, and one majority-white district configuration of the Bronx was approved. (*See* DX 138 (Letter from Ralph F. Boyd, Jr., Ass't Attorney General, U.S. Department of Justice, to Michael A. Carvin, Esq., Jones, Day, Reavis & Pogue, et al., (June 17, 2002)); DX 137 (Letter from Sen. Dean G. Skelos and Assemblyman William L. Parment, Co-Chairmen, LATFOR, to Chief of Voting Section, Civil Rights Division, U.S. Department of Justice (Apr. 30, 2002) ("The redistricting plans for the Senate and

(d) *Burgeson 2001 Memoranda*

The plaintiffs also cite three memoranda written by Burgeson in 2001, dated May 4, 2001 (PX 18), June 21, 2001 (PX 19), and December 18, 2001 (PX 21), which they claim "document a clear intent to pack the [Westchester County] area north of the Bronx border with population in order to make that white population available to the redrawn District 34." (PFF ¶ 711.)

The key passages of the memoranda that the plaintiffs cite come from a December 18, 2001 memorandum from Burgeson to Sen. Skelos and copied to Vinny Bruy (a Republican appointee to LATFOR), entitled "The 135," which states in pertinent part:

> There seems to be a bit of confusion over the provenance of the population numbers in Westchester which is to be attached to Bronx County. There has been some speculation that this number has been arbitrarily chosen out of thin air. It has not....
>
> ....
>
> Through the examination of various combinations of counties, the following combination (which I'll call the Hudson R/A [Reapportionment Area]) maximizes the Westchester portion attached to Bronx.
>
> ....
>
> Thus, there is method (maximizing the Westchester total), not arbitrariness in selecting which R/A to use in calculating the portion of Westchester connected to Bronx.
>
> The only consideration now, is how (or if) it is divided between Senators Velella and Hassell-Thompson. If it is not divided, and Senator

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Assembly promulgated after the 1990 census were precleared in July 1992; 29 CFR 51.27(p). All court challenges to the 1990 plan were dismissed.")).)

> Velella receives the entire "135", I would suggest that the U.S. Justice Department would look unkindly on eliminating a minority legislator.

(PX 21 at 1-2.) [178]

Dr. Beveridge, the plaintiffs' expert, construes these memos to mean that "Districts 40 and 41 [in the three northern counties of Putnam, Dutchess, and Columbia] were underpopulated, and the Districts 17-37 [in the more southern counties of Westchester, Bronx, New York, and Richmond] were further overpopulated, in order to increase the amount of Westchester population in the bi-county districts. The decisions to keep Queens County intact, and not to keep Kings County intact, were made in order to produce the 'reapportionment area' that would maximize the amount of Westchester population in the bi-county districts." (Beveridge Decl. ¶ 43; PX 17 at 1-2; PX 21 at 2.) He, thus, concludes that approximately 135,000 people were included in the Bronx/Westchester districts for the "specific goal" of "maximiz[ing] the amount of Westchester population, which is overwhelmingly white, in District 34" (*id.* ¶ 49), and that the 135,000 people were divided between SDs (old) 33 and 34 to avoid pairing Sen. Hassell-Thompson (who lives in Mount Vernon, in Westchester) with Sen. Velella (PX 21 at 2).

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[178] The May 4, 2001 memorandum was sent to Sen. Skelos and Steve Boggess (whose affiliation has not been established), and copied to Vinny Bruy and is entitled "Reapportionment Areas" ("R/As"). It sets forth the eleven R/As that were under consideration, including a Queens R/A, Brooklyn R/A, and Hudson R/A, which included Richmond (Staten Island), New York (Manhattan), Bronx, Westchester, Putnam, Dutchess, and Columbia Counties. (PX 18 at 1-3.) The June 21, 2001 memorandum, sent to Sen. Skelos, Steve Boggess, and Vinny Bruy and entitled "Westchester," "discuss[es] the particulars of how [Mr. Burgeson] determined the population total in Westchester to be connected to Bronx." (PX 19 at 1.) Three alternative versions of the Hudson R/A are set forth, all of which state "[t]otal left in Westchester for SD's [old] 33 & 34." Under two scenarios, approximately 131,000 total population is "left for SD's 33 & 34"; under the third scenario, 135,033 people are designated for SDs 34 and 35. (*Id.* at 2.)

These memos hardly prove racial predominance. Quite the contrary. First, as the plaintiffs themselves concede, one objective for splitting the Westchester population between Sens. Velella and Hassell-Thompson was to avoid harming the majority-black district, which is plainly a legitimate districting consideration. (*See id.* ("If it [the Westchester portion containing 135,000 people] is not divided, and Senator Velella receives the entire '135', I would suggest that the U.S. Justice Department would look unkindly on eliminating a minority legislator.").) Second, the memoranda reflect a political intention to support Sens. Velella and Hassell-Thompson, which is what the Senate Plan did, and to avoid pairing incumbents, both of which are appropriate districting considerations. (*See id.*) Third, there is no indication in the memoranda that the Senate majority's goal was to create a white district (SD 34) as opposed to a safe Republican district, also an appropriate (political) districting objective. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment.... The reality is that districting inevitably has and is intended to have substantial political consequences."). Fourth, the options and scenarios reflected in the memoranda appear to be well within the purview of legislators who seek to balance multiple and sometimes competing interests in the course of developing redistricting plans. *See Miller*, 515 U.S. at 915 ("Electoral distr cting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.... [T]he good faith of a state legislature must be presumed.").

4. *Traditional Districting Principles*

For the reasons stated, the evidence presented by the plaintiffs does not reflect that race predominated over traditional districting principles. Indeed, the record reflects unequivocally that SD 34 comports with several traditional (non-racial) districting principles, as follows:

First, SD 34 is of substantially equal population with the

Senate Plan's 61 other districts. Its total population of 311,260 falls within 1.7% of the ideal district population. (PX 6 tbl.10.) *See Marylanders*, 849 F. Supp. at 1054.

Second, 2002 SD 34 preserves the geographic and population cores of its 1992 predecessor district. In so doing, we think it a fair inference that SD 34 also maintains established links between its constituents and their incumbent senator, Sen. Velella, while also maintaining corresponding links for the constituencies of neighboring districts with their Bronx senators. The configuration of the district has changed little since 1992, with 87.7% of the 2002 SD 34 population coming from the 1990s district. (Burgeson Aff. ¶ 32.) And, if we focus upon the Bronx base of the district, fully 96.8% of SD 34 was retained in 2002. (*Id.*) The preservation of the core of this district is an important, plainly observable, traditional districting principle. (*See, e.g.*, DX 141 ¶ 39 (in which districting expert Bernard Grofman included "preserving the cores of existing districts and, to the extent feasible, ... the configurations of existing districts" within the category of "traditional districting criteria").) [179] The plaintiffs' own senior research analyst, Mr. Breitbart, "agreed that the 2002 Senate Plan did a much better job of preserving the cores and configurations of existing districts than the Revised Plaintiffs' plan." (Stip.¶ 64.) Indeed, the parties have stipulated that: "The 2002 Senate Plan preserves, on average, more of the cores of existing districts than the Revised Plaintiffs' Plan." (*Id.* ¶ 235.)

Third, SD 34's contours protect an incumbent (Republican) senator and avoid pairing incumbents, particularly Sen. Velella and Sen. Gonzalez. (Burgeson Aff. ¶ 39 ("88% of Senator Velella's constituents under the 2002 Senate plan come from

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[179]. Dr. Grofman's affidavit, dated May 11, 2002, was submitted to the Court in connection with the development of Special Master Lacey's congressional plan. (DX 141 ¶ 2-5; *see also* Burgeson Aff. ¶ 6 ("The 2002 Senate plan furthers the important neutral principle of preserving the cores of the then-existing Senate districts to the extent practical, while keeping cognizant of population shifts.").)

the district that he easily won in the 1990s.").) This contrasts with the Plaintiffs' Revised Plan, which pairs Sen. Velella with (Democratic) Sen. Gonzalez in a matchup favoring Sen. Gonzalez. (*Id.* ¶ 39-40.) "It is a practical flaw for a plan to have excessive incumbent pairings." (*Id.* ¶ 14.) We agree with the defendants that it is plain that the Senate majority had a powerful political incentive to avoid eliminating the district of a senior Republican incumbent or pairing him with a Democratic incumbent in a majority-Hispanic district that the Republican could not expect to win.[180] *See Vera*, 517 U.S. at 965 ("[W]e have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal." (citations omitted)); *see also Chen*, 206 F.3d at 507 ('The objective case against a district may also be affected by an analysis of whether the district adheres to traditional districting principles other than compactness, such as political considerations...." (citing *Vera*, 517 U.S. at 969-71)). All of the Bronx 2002 redistricting favored incumbents, and it is not at all surprising that the Senate Plan received political support from Bronx Democrats and Republicans alike, including the votes of four of the five senators and the approval of the fifth, Sen. Hassell-Thompson.

Fourth, SD 34 has evolved as the Bronx population has changed and as majority-minority districts have been added to reflect Voting Rights Act requirements. *See Robertson v. Bartels*, 148 F. Supp. 2d 443, 458 (D.N.J. 2001) (finding that strict scrutiny did not apply because the districting plan "carefully was drawn utilizing traditional redistricting principles while seeking to comply with the Voting Rights Act by giving minority candidates the opportunity to be elected to political office"), *aff'd mem.*, 534 U.S. 1110 (2002). In 1992, as we have shown, the majority-minority black district–then SD 33–moved into Westchester County and annexed a portion of SD 34. Changes to SD 34 were also occasioned, in part, by the

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[180] As the parties have stipulated, no Republican senator has ever been paired with another incumbent senator, Republican or Democrat, in the history of redistricting in New York. (Stip.¶ 234.)

addition of a third majority-Hispanic district in the Bronx; a part of the district represented by Sens. Bernstein and Korman was added to SD 34. These changes, in turn, facilitated the establishment of three Hispanic districts, SDs 28, 31, and 32, in the southern and western portions of the Bronx.[181] There is no persuasive evidence that SD 34 in 2002 or in the 1990s reflected a legislative purpose to create a white district, rather than, for example, drawing a district accommodating incumbent senators and majority-minority districts.[182]

5. *Politics/Race: Cromartie II*

The Supreme Court has observed that "[p]olitics and political considerations are *inseparable* from districting and apportionment.... It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area." *Gaffney*, 412 U.S. at 753 (emphasis added). It is certainly true that politics played a role in the 2002 redistricting of SD 34. Among the documents which Magistrate Judge Frank Maas reviewed *in camera* in this case were political requests by Republican legislators to adjust the lines of their districts in ways they believed would "enhance their chances (or those of their successors) to prevail in future elections." (*Rodriguez*, 2003 WL 22109902, at *2, dated Sept. 10, 2003, (Maas, M.J.).) [183] The plaintiffs' own senior research analyst with the Office of

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[181] We also agree with the defendants that the contours of SD 33 in 1992 were likely influenced, in part, by section 5 of the Voting Rights Act, which required the Legislature in 1992 to preserve (not diminish) the sole majority-minority black district in the Bronx. (Tr. at 268-69 (Beveridge).) In 2002, the four majority-minority districts in the Bronx were maintained in accordance with section 5. (*See* DX 138.)

[182] "There are ... a number of important nonracial principles directly served by preserving District 34, and its shape was not related to diluting minority voting strength or segregating any racial group." (Burgeson Aff. ¶ 31.)

[183] Judge Maas generally ruled in favor of document disclosure in this case but, describing these documents as "political," he concluded that "disclosure ... would add nothing to the discussion of the legality of the Senate majority's final plan if, as is generally the case, the request was couched in political rather than racial or ethnic terms." *Id.*

Minority Counsel for the State Senate, Mr. Breitbart," 'assume[d]' that the Senate Republican majority had a political motivation for drawing Senate District 34 the way it did." (Stip.¶ 176.) And, it is quite obvious, as the defendants maintain, that the Senate majority had a strong motive to help Sen. Velella, a Republican, hold onto his seat--perhaps especially because it is in a Democratic district. We have already noted that Sen. Vellela has prevailed in SD 34 for sixteen years, and Sen. Paterson testified that the Democrats failed in their efforts to field a serious challenger against Sen. Velella in 2002 because "there really wasn't a realistic chance of beating him." (Tr. at 519.) The Plaintiffs' Revised Plan would spell political trouble for Sen. Velella by pairing him against Sen. Gonzalez.

We agree with the defendants that the redistricting of SD 34 is properly justified by adherence to neutral districting principles, such as preserving cores and avoiding incumbent pairing, and by avoiding the partisan reconfiguration against Sen. Velella "that characterizes all of the alternatives." (DFF Response ¶ 32.) Indeed, the partisan political impact in the Bronx and elsewhere of adopting the 2002 Senate and Assembly Plans, rather than the alternative plans, had the anticipated consequence:– virtually all Republican and Democratic incumbents were reelected. (*See* Burgeson Aff. ¶ 38.)

We also believe it has been shown here that racial identification correlates with political affiliation in the Bronx. Dr. Stanley described the data in the following way:

> Analyzing voting patterns in general elections, the bulk of the contests Professor McDonald and Dr. Handley analyze, confirms that black and Hispanic voters back Democratic candidates. This is no surprise, since the Democratic inclinations of black and Hispanic voters are well-known facts in the political science literature. In contrast, whites are much more split in their partisan preference,

> sometimes supporting Republicans, sometimes Democrats. With respect to the elections analyzed, whites certainly seem to lean Republican in the Nassau districts (although the pattern is far more mixed in the Bronx/Westchester).

(Stanley Aff. ¶ 37.) While the evidence of white voting behavior in the Bronx/Westchester may be somewhat "mixed," there is evidence that in SD 34 white voters lean Republican at least in State Senate elections and have done so for at least sixteen years.[184] The plaintiffs have not shown, as they must, that considerations of race rather than politics predominated in the configuration of SD 34. The plaintiffs cite the defendants' assertion of legislative privilege and the absence of political (presumably written) data before the Legislature when it voted on the Senate Plan, arguing that the defendants cannot now rely on the argument that politics predominated "w[illegible] the uncontradicted testimony is that members of the legislature were supplied with racial data, not political data, on the districts before they voted on the 2002 Senate Plan." (PFF ¶ 721.) The plaintiffs also urge us to draw the adverse inference that the defendants' invocation of legislative privilege regarding how SD 34 was drawn indicates that race must have predominated. The defendants counter persuasively that such an inference is unwarranted because "it was not necessary for [Senate Majority Leader] Bruno to take the stand and make the astonishing revelation that politics may have seeped into the redistricting process, or that Senator Velella is better off in current District 34 than in a majority-Hispanic district with a Hispanic incumbent." (DFF Response ¶ 31.) We find that no

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[184]. To take one example from our discussion of Count III, the plaintiffs' expert, Dr. McDonald, estimated that in the 2000 SD 34 Senate Democratic primary, 72.2% of whites supported the winning candidate (Lorraine Coyle Koppell), as compared to 61.7% of black voters and 46.2% of Hispanic voters. (McDonald Decl. ¶ 24.) But in the general election against Republican Sen. Velella, Koppell received nearly unanimous support of black and Hispanic voters (99.3% and 99.2% respectively), but only 31.9% from white voters (and was defeated).

adverse inference is warranted.

"In a case ... where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." *Cromartie II*, 532 U.S. at 258. The plaintiffs have made no such showing here. We find that "where, as here, there is a strong correlation between race or ethnicity and party, drawing district lines along political lines that may coincide with racial or ethnic lines does not evidence intentional racial discrimination." *Session*, 298 F. Supp. 2d at 508 n.201. The plaintiffs have therefore failed to prove that SD 34 was drawn predominantly on the basis of race. Accordingly, we find no equal protection violation under *Shaw*.

VI. CONCLUSION

For the reasons explained above, each of the claims by the plaintiffs and the plaintiffs-intervenors should be dismissed. The Clerk is therefore directed to enter judgment dismissing the Complaint and closing this case.

SO ORDERED.

Appendix B

United States District Court
S.D. New York

Eric RODRIGUEZ, et al.
v.
George E. PATAKI, et al.

Howard T. Allen, et al.
v.
George E. Pataki, et al.

Nos. 02 Civ. 618, 02 Civ. 3239

July 28, 2003

MAAS, United States Magistrate Judge.

I. Introduction

These consolidated actions (hereinafter, "action") challenging the New York Legislature's 2002 State Senate and Congressional redistricting plans are pending before Chief Circuit Judge Walker and District Judges Berman and Koeltl.[1] The three-judge court recently denied the defendants' motion to dismiss, concluding that any determination on the merits before the plaintiffs were afforded an opportunity to engage in discovery would be premature. *See Rodriguez v. Pataki*, 274 F. Supp. 2d 363, 2003 WL 21782327 (S.D.N.Y. 2003).[2] Because the

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[1] Pursuant to 28 U.S.C. § 2284(a), a three-judge court must be convened whenever "an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."

[2] This order appears not to have been docketed and, consequently, is unavailable on Lexis or Westlaw.

issues raised in this action need to be resolved well in advance of the 2004 election, discovery has been placed on an accelerated schedule which calls for its completion by September 19, 2003. In addition, to facilitate that process, supervision of pretrial discovery has been referred to me.

I held an initial discovery conference on July 1, 2003. Thereafter, by letter-motion dated July 3, 2003 ("Pls.' Letter"), the plaintiffs and plaintiff-intervenors (collectively, "plaintiffs") moved to compel the production of "all documents relating to the analysis and process employed by [the d]efendants" in developing the 2002 Senate and Congressional redistricting plans, as well as responses to their interrogatories concerning these subjects. By letter dated July 11, 2003 ("Defs.' Letter"), defendant Joseph Bruno, Majority Leader of the New York State Senate, joined by defendant Sheldon Silver, Speaker of the New York State Assembly, opposed this motion on the basis of legislative immunity/privilege. On July 15, 2003, the plaintiffs submitted a reply letter-brief ("Pls.' Reply Letter").

On July 23, I held a telephone conference with lead counsel (Messrs. Richard D. Emery and Michael A. Carvin), during which I conveyed my conclusions regarding the defendants' claims of privilege. For reasons which are explained in further detail below, I advised counsel that the plaintiffs' motion to compel would be granted in part and denied in part. I further directed the parties to take certain steps to ensure that discovery will be completed by the September 19 deadline. Those directives were issued without prejudice to either side's right to file objections to my determination of the parties' privilege dispute within ten days after the issuance of this Opinion and Order.[3]

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[3] Pursuant to Fed. R. Civ. P. 72(a), a party filing such objections would have to show that a portion of this Opinion and Order is "clearly erroneous or contrary to law."

II. Background

Article III, Section 4, of the New York State Constitution, provides that after each decennial Census, the New York State Senate and Assembly districts must be "readjusted or altered" so that each district contains, to the extent possible, "an equal number of inhabitants, excluding aliens, in as compact form as practicable." In 1978, as part of an appropriations bill, the New York legislature created an advisory Task Force on Demographic Research and Reapportionment ("LATFOR") to provide technical assistance to the New York legislature with respect to the task of redistricting Senate, Assembly, and Congressional districts. (*See* S.7302-A, A.9502-A (Jan. 17, 1978)). LATFOR consists of six members, of whom four are legislators and two are non-legislators. (*See id.* at 10). One non-legislator is appointed by the President Pro Tem of the Senate; the other by the Assembly Speaker. (*Id.*). In addition to its members, LATFOR has a staff, which includes two co-executive directors. (*Id.*; Bruno Resp. to Pls.' Interrog. No. 22; http://www.dasny.org/ dasny/board/board.shtml) (last visited July 25, 2003). LATFOR is authorized to hold public and private hearings and has all the powers of a legislative committee. (S. 7302-A, A.9502 at 11).

According to the LATFOR website, the non-legislators currently on the task force are Mark A. Bonilla, who was appointed by Senator Bruno, and Roman Hedges, who was appointed by Assembly Speaker Silver. (*See* http://www.latfor.state.ny.us) (last visited July 25, 2003). Mr. Bonilla is a lawyer with a private practice on Long Island. (*See* http://204.168.97.3/pressreleases.nsf/0/8513c44567fcb62985256b7400526a68?) (last visited July 25, 2003). Dr. Hedges is a member of the Board of Directors of the New York State Dormitory Authority and also serves as Deputy Secretary of the New York State Assembly Committee on Ways and Means. (*See* http://www.dasny.org/dasny/board/ board.shtml) (last visited July 25, 2003).

After the plaintiffs commenced this action, LATFOR

published its proposed Senate and Assembly redistricting plan on February 14, 2002. (Am. and Consol. Compl. ("Complaint" or "Compl.") ¶ 103). Thereafter, the New York Legislature adopted LATFOR's plan, which was signed into law by Governor Pataki in late April 2002. (*Id.* ¶ 104).

Following the adoption of a new legislative map, any aggrieved citizen may file an action in state court to seek review of the redistricting plan. N.Y. Uncons. L. § 4221 (McKinney 2000) ("Section 4221"). Section 4221 provides that service of such a suit shall be made "upon the attorney-general, the president of the senate, the speaker of the assembly and the governor," by such means as the state court may direct. *Id.* Consistent with this procedure, the *Allen* lawsuit (02 Civ. 3239) was originally commenced in Supreme Court, New York County, but was later removed here. The *Rodriguez* suit (02 Civ. 618) was initially filed in this Court.

The Complaint in this action alleges that the defendants have underpopulated upstate Senate districts and overpopulated downstate Senate districts in a manner which causes the over-representation of upstate non-Hispanic white voters. (*See* Compl. ¶ 106-38). The plaintiffs contend that this intentional conduct violates the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. (*Id.* ¶ 1; *see also* Pls.' Letter at 2). Several plaintiffs also have challenged the 2002 Congressional redistricting plan. (Compl.¶ 340-60). Finally, the plaintiffs accuse the defendants of racial gerrymandering in Senate District 34. (*Id.* ¶ 329-38).

Not surprisingly, in their answers to the Complaint, Senator Bruno and Assembly Speaker Silver deny many of the Plaintiffs' allegations. (*See* Docket Nos. 212, 216). In addition, both defendants allege as affirmative defenses that at least some of the plaintiffs lack standing and that the plaintiffs have failed to state a claim upon which relief can be granted. (*See* Docket Nos. 212 at 31-32, 216 at 38).[4] Neither defendant has

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[4] Speaker Silver also has asserted other affirmative defenses. (*See* Docket No.

asserted legislative immunity as an affirmative defense, nor have they sought to be dismissed from this action on that ground.

In or around September 2002, the plaintiffs served the defendants with a combined document demand and set of interrogatories through which they sought information concerning the process by which the 2002 redistricting maps were drawn and subsequently adopted by the Legislature. Senator Bruno, apparently acting on behalf of all the legislator-defendants, responded to these requests in October 2002. (*See* Pls.' Ex. 3). Thereafter, at the request of all of the parties, I stayed any further discovery proceedings pending the three-judge court's determination of the defendants' motion to dismiss the Complaint. (*See* Docket No. 189). That stay remained in effect until late last month when the court denied the motion.

III. Discussion

A. Applicable Law

1. General Legal Principles

Because subject matter jurisdiction in this action is founded on the existence of federal questions, the availability of any privileges presents a question of federal common law. *See, e.g.*, Fed. R. Evid. 501 (privilege in federal question cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience"). "[T]estimonial exclusionary rules and privileges are not favored." *von Bulow v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987). This is so because they "contravene the fundamental principle that 'the public ... has the right to every man's evidence.' " *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). Privileges consequently must be "strictly construed and accepted 'only to the very limited extent that permitting a

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212 at 31-32).

refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

In this case, the defendants oppose the motion to compel based upon the interrelated principles of legislative immunity and legislative privilege.

2. Legislative Immunity

The doctrine of absolute immunity for state legislators is an outgrowth of the Speech or Debate Clause of the United States Constitution. Article I, Section 6, of the Constitution provides that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place." When this legislative immunity applies, Senators and Representatives are shielded from any award of damages or prospective relief, and cannot be put to the "burden of defending themselves." *Supreme Ct. of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 732 (1980) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). The immunity, which has "taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), is consistent with our system of separation of powers and fosters the unrestrained debate that our forefathers deemed essential to democratic government. *Id.* at 372-74; *United States v. Helstoski*, 442 U.S. 477, 491-92 (1979); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975).

Although the federal Speech or Debate Clause, by its terms, applies only to Congress, many state constitutions contain similar provisions. *See Fla. Ass'n of Rehab. Facs. v. Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 265 (N.D. Fla.1995) ("As of 1981, 43 states had speech or debate clauses, and 5 exempted legislative members from arrest during a legislative session; Florida and North Carolina legislators alone had no specific constitutional protection."). In New York, Article III, Section 11, of the State Constitution echoes the federal language and

provides that "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." The New York Court of Appeals has held that this clause confers immunity for any acts which are an integral part of the legislative process. *People v. Ohrenstein*, 77 N.Y.2d 38, 53-54 (1990). Furthermore, the clause shields New York legislators from the burden of having to defend against suits in the New York state courts arising out of their legislative acts. *Urbach v. Farrell*, 229 A.D.2d 275 (3d Dep't 1997); *Straniere v. Silver*, 218 A.D.2d 80 (3d Dep't 1996).

Under the Supremacy Clause, a federal court clearly is not bound by the Speech or Debate Clause of the New York Constitution. *See United States v. Gillock*, 445 U.S. 360, 370 (1980). Also, because the defendants are not federal lawmakers, the Speech and Debate Clause of the federal Constitution is not directly applicable. *Id.*

Federal courts nevertheless routinely accord state legislators "common-law immunity from liability for their legislative acts ... that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Consumers Union*, 446 U.S. at 732 (citing *Tenney*). State legislators therefore are entitled to the dismissal of Section 1983 suits brought against them to recover monetary damages or declaratory or injunctive relief. *Id.* at 732; *Tenney*, 341 U.S. at 379. When common law legislative immunity applies, state legislators are immune from suit in federal court "to the same extent as their federal counterparts." *Star Distribs., Ltd. v. Marino*, 613 F.2d 4, 9 (2d Cir. 1980). For that reason, common law legislative immunity for state legislators is absolute. *See Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) ("It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities."); *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 210 (2d Cir. 2003) ("Legislators are entitled to absolute immunity from civil liability for their legislative activities.").

A modern-day legislature, of course, cannot operate strictly

through the efforts of its members. As a consequence, "[t]he doctrine of legislative immunity is also applicable to legislative staff members, officers, or other employees of a legislative body, although it is considered 'less absolute' as applied to these individuals." *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 298 (D. Md.1992) (citing *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967), and *Tenney*, 341 U.S. at 378).

3. Legislative Privilege

Closely related to the concept of legislative immunity is the concept of legislative privilege. Although the two doctrines are often discussed interchang eably, *see, e.g., Marylanders for Fair Representation*, 144 F.R.D. at 304 (referring to "testimonial legislative immunity"), there is one key difference. Legislative immunity entitles a state legislator, in an appropriate case, to the dismissal of all of the claims against him or her in the complaint, much as judicial immunity entitles judges to the dismissal of suits against them arising out of the p .formance of their judicial functions. *Consumers Union*, 446 U.S. at 733-34; *Star Distribs.*, 613 F.2d at 6-7. Legislative privilege, on the other hand, is not absolute. *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) ("[S]uch privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides."); *Fla. Ass'n of Rehab. Facs.*, 164 F.R.D. at 267 ("There probably is a qualified state legislative evidentiary privilege...."). Thus, courts have indicated that, notwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions. *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) ("In some extraordinary instances [legislators] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."); *Carver v. Foerster*, 102 F.3d 96, 104 (3d Cir. 1996) ("judicial inquiry of legislative motive is not per se forbidden.").

In this action, Senator Bruno and the other legislator-defendants have not moved to dismiss the Complaint as

against them on legislative immunity grounds.[5] Moreover, at least at this juncture, the plaintiffs are not seeking any depositions of legislators or their staffs. Accordingly, the narrow issue presented is whether Senator Bruno, Speaker Silver, and the other legislator-defendants are entitled to resist the limited discovery presently sought by the plaintiffs on the basis of the qualified legislative privilege. The plaintiffs contend that the legislator-defendants' effort to invoke legislative privilege to preclude this discovery necessarily fails for at least three reasons, each of which will be considered in turn.

4. Alleged "Important Interests" Exception

The first alleged exception to legislative privilege that the plaintiffs suggest is applicable here relates to cases in which the plaintiff seeks to vindicate important federal interests. (*See* Pls.' Letter at 4). The plaintiffs argue that this exception was given recognition in the Supreme Court's decision in *Gillock*, 445 U.S. at 370.

In *Gillock*, a Tennessee legislator was indicted on federal charges arising out of his alleged taking of bribes and other financial improprieties. *Id.* at 362. The defendant-legislator argued that the common law privilege for state legislators was as broad as the privilege afforded to members of Congress under the federal Speech or Debate Clause and therefore prohibited the introduction of any evidence at his federal criminal trial concerning his legislative acts and the motivations underlying them. *Id.* at 366.

The Supreme Court noted that there are two related rationales for the protections accorded members of Congress under the Speech or Debate Clause of the United States Constitution: "the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and ... the desire

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[5] The prior motion to dismiss, submitted on behalf of Senator Bruno, Speaker Silver, Governor Pataki, Attorney General Spitzer, and others, alleged that the plaintiffs lacked standing and that four counts of the Complaint failed to state a claim upon which relief could be granted. (*See* Docket No. 199).

to protect legislative independence." *Id.* at 369. The Court found neither of these rationales applicable to the defendants. As the Court observed, the prosecution of a state legislator raised no separation of powers (or comity) concerns because the Supremacy Clause clearly contemplated that federal law would prevail in areas such as enforcement of the federal criminal laws which were specifically delegated to the federal government. *Id.* at 370. Additionally, although the Court previously had held in *Tenney* that state legislators were immune from civil suits under Section 1983, *Gillock* noted that *Tenney* and its progeny had "drawn the line at civil actions." *Id.* at 373.

Following this discussion, the Court went on to observe in arguably broader language that "where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." *Id.* The Court noted that a similar result had been reached in *United States v. Nixon*, 418 U.S. 683 (1974), where the President's claim of executive privilege was subordinated to the need to enforce the federal criminal laws.

The parties divine different rules from *Gillock*. The plaintiffs emphasize the first clause quoted above, arguing that "where important federal interests are at stake" no common law legislative privilege is available to a state legislator in federal court. (Pls.' Letter at 4). They further contend that the unlawful denial or diminution of voting rights is such an important federal interest. (*Id.*) The defendants stress the second clause, suggesting that *Gillock* simply defined the outer boundaries of the legislative privilege in a manner which precludes its invocation in a federal criminal case. (Defs.' Letter at 5).

Following *Gillock*, in *In re Grand Jury*, the Third Circuit also considered the availability of a federal privilege for state legislators in the context of a criminal investigation. In that case, the United States Attorney sought to compel certain state legislators to comply with a federal grand jury subpoena seeking records related to a state legislative committee's investigation of alleged contract fraud. *In re Grand Jury*, 821 F.2d at 948, 950. Balancing the needs of the prosecutor against

the legislators' need to protect their thought processes, the district court quashed much of the subpoena, but required disclosure of the identities of the witnesses appearing before the committee and any documents written by persons not associated with the committee members which could not be obtained through other means. *Id.* at 950.

On appeal, the Third Circuit was critical of the district court's case-specific approach to determining the availability of the legislative privilege. *Id.* at 955. As the court explained, "[s]uch a narrow focus was in error because a court must first decide whether a qualified privilege exists or should exist before deciding how to apply it in a particular case." *Id.* After a lengthy analysis, the court concluded that "[n]either the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justified a qualified privilege for the full range of legislative activities normally protected by the [federal] Speech or Debate Clause." *Id.* at 958. Nevertheless, the court did not preclude the district court, on remand, from applying a more narrowly-tailored privilege which would shield from disclosure the legislature's confidential deliberations, but not any underlying factual information. *Id.* at 958-59. The court further held that the district court could, if necessary, order an *in camera* inspection of the disputed documents. *Id.* at 959.

Similarly, in *Fla. Ass'n of Rehab. Facs.*, the court concluded that there "probably is a qualified state legislative evidentiary privilege" in federal court. *Fla. Ass'n of Rehab. Facs.*, 164 F.R.D. at 267. Describing *In re Grand Jury* as "the most persuasive authority" for the scope of that privilege, the court stated that "if any privilege should be recognized ..., it should be a 'deliberate process privilege.' " *Id. See also Searingtown Corp. v. Inc. Village of North Hills*, 575 F. Supp. 1295, 1299 (E.D.N.Y. 1981) (honoring the defendants' assertion of privilege insofar as the plaintiffs sought to compel the defendants "to answer questions relating to their motivations and deliberations regarding legislation they enacted").

The deliberative process privilege that the courts have

applied in such circumstances is more typically asserted in cases which challenge the decisions of administrative agencies. That privilege " 'protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions.' " *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 147 (2d Cir. 1994) (quoting *Hopkins v. U.S. Dep't of Hous. and Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991)). In *Hopkins*, the Second Circuit explained the two-fold showing that an agency must make to invoke the deliberative process privilege:

> First, the document must be "predecisional," that is, "prepared in order to assist an agency decisionmaker in arriving at his decision." Second, the document must be "deliberative," that is, "actually ... related to the process by which policies are formulated." Thus, the privilege "focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' "

Hopkins, 929 F.2d at 84-85 (internal citations omitted).

In the agency context, the deliberative process privilege "does not, as a general matter, extend to purely factual material." *Id.* at 85. Moreover, even when the deliberative process privilege applies, it is a qualified privilege which may be overcome upon a showing that the adverse party's need for disclosure outweighs the interest in confidentiality. *See In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979). At least one court has found that this balancing test precludes the assertion of the deliberative process privilege in a case involving the Voting Rights Act. *See United States v. Irvin*, 127 F.R.D. 169, 173-74 (C.D. Cal. 1989). *See also Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 298 (D.P.R. 1989) (declining to apply the deliberative process privilege to state legislators and directing the disclosure of documents because the legislature is the "part of the governmental branch that has historically has been subjected to the greatest degree of public

accountability").

Perhaps the case closest to the facts of this action is *Marylanders for Fair Representation.* There, the Maryland Constitution provided for redistricting to begin with the Governor's submission of a proposed redistricting plan to the state's General Assembly. *See Marylanders for Fair Representation,* 144 F.R.D. at 295. Pursuant to the Maryland Constitution, if the General Assembly failed to enact its own plan within forty-five days, the Governor's plan would become law. *Id.* Following the 1980 Census, the Governor developed his plan with the assistance of an ad hoc five-member advisory committee, which consisted of two legislators and three private citizens. *Id.* at 296. When the Governor submitted his plan for approval, the General Assembly failed to take any action; as a result, the Governor's plan became law. *Id.*

On these facts, the three-judge court unanimously concluded that the legislators on the Governor's ad hoc committee were entitled to absolute immunity, and it dismissed the complaint as against them. *Id.* at 301. All three judges further agreed that the Governor's actions in preparing legislation for the General Assembly were akin to those typically undertaken by a legislator or legislative aide, and that the Governor was therefore also entitled to legislative immunity. *Id.* at 300-01. Where the judges parted company, however, was in their consideration of the extent to which pretrial discovery could explore the rationale underlying the Governor's redistricting plan. Citing *Corporacion Insular* and *Helstoski,* among other cases, all three judges apparently agreed that the *documentation* prepared by the committee was subject to disclosure unless it was shielded by a privilege other than the legislative privilege. *Id.* at 302 n.20. The majority further concluded that the private citizen members of the Governor's committee could be compelled to provide deposition testimony concerning the committee's deliberations. *Id.* at 304-05. Finally, although the court unanimously held that the legislator-defendants' privilege precluded their being deposed as to any action that they took once the Governor's plan reached the

General Assembly (unless they were later designated as trial witnesses), the majority did not rule out the possibility of deposing the legislators about their prior actions as committee members. *Id.* at 302, 305. A final decision on this question was deferred until the private members of the committee had been deposed and a fuller factual record was available. *Id.* at 305.

5. Alleged Exception for Cases in Which the Decisionmaking Process is an Issue

The second exception to the qualified privilege for state legislators that the plaintiffs urge upon the Court relates to cases in which the legislative decisionmaking process is central to the plaintiff's claim. (*See* Pls.' Letter at 6). The plaintiffs read this purported exception into the decision in *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). That case, however, did not involve an attack on the acts of a state legislature. Instead, the issue presented was whether the executive branch of the federal government, in the form of the Federal Reserve Board and Comptroller of the Currency, could resist a subpoena based upon the deliberative process privilege. *See id.* at 1422. The plaintiff trustee in bankruptcy served that subpoena in an effort to adduce evidence that the FDIC had improperly caused assets to be transferred to an insolvent bank from its insolvent corporate parent in order to reduce the FDIC's financial exposure. *Id.* at 1423. The Court of Appeals for the District of Columbia Circuit held that the qualified deliberative process privilege applies in cases "where the governmental decisionmaking process is collateral," but not when "the plaintiff's cause of action is directed at the government's intent." *Id.* at 1424. As the court explained, the deliberative process privilege is intended to avoid chilling governmental decisionmaking. *Id.* The court found that "if either the Constitution or a statute makes the nature of the governmental officials' deliberations *the* issue, the privilege is a nonsequitor." *Id.* (emphasis in original).

The plaintiffs have pointed to no authority in the Second Circuit expressly adopting the view that the legislative or

deliberative process privilege is unavailable whenever a plaintiff's claim calls into question the legislature's decisionmaking processes. Were that a basis for denying a defendant's legislative privilege claim, there would be few, if any, cases in which state legislators could shield their personal thought processes from view. For example, as the plaintiffs apparently argue, the legislative privilege could never be asserted in a redistricting case alleging a violation of the Voting Rights Act. No decision cited by the plaintiffs appears to have gone this far.

Nonetheless, as noted above, the cases discussing both the legislative and deliberate process privileges make clear that these protections are only "qualified." Accordingly, either privilege may be overridden in circumstances where "reason and experience" suggest that the claim of privilege should not be honored. *See* Fed. R. Evid. 501; *Manzi v. DiCarlo*, 982 F. Supp. 125, 131 (E.D.N.Y. 1997) (indicating that the court needs to "balanc[e] the various competing interests" to determine whether to apply the deliberative process or state legislative privilege to shield the legislature's documents from discovery); *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. at 583 (setting forth the factors to consider).

6. Waiver

Finally, the plaintiffs contend that even if the defendants could assert a legislative or deliberative process privilege, they have waived their right to do so through their active participation in this action. (Pls.' Letter at 7). They base this contention, in part, on the Third Circuit's decision in *Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001). In *Powell*, several leaders of the Pennsylvania General Assembly intervened in a suit brought against the Governor of Pennsylvania, among others, to challenge the state's method of funding public education, but sought to resist disclosure of their files based upon their legislative privilege. *Id.* at 522.

On appeal, the Third Circuit noted that the legislator-defendants could have sought dismissal of the claims against

them on legislative immunity grounds, but were instead "self-made defendants," who were seeking to assert an entirely different form of protection, which would "enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined." *Id.* at 525. The court also observed that the issues raised by the plaintiffs could have been resolved in a lawsuit naming as defendants only the executive officers charged with carrying out the legislature's decisions. *See id.* at 529 (Roth, J., concurring). On these facts, the court held that the privilege being advanced by the legislator-defendants was one which "does not exist." *Id.* at 525.

B. Application of Law to Facts

1. Legislative Immunity

The plaintiffs' motion to compel does not seek any relief which requires this Court to determine whether Senator Bruno, Speaker Silver, and the remaining legislator-defendants are entitled to claim legislative immunity on the facts of this case. Indeed, any such determination would plainly be beyond the limited scope of the three-judge court's reference to me. Nevertheless, even if the legislator-defendants had asserted legislative immunity as a defense, and the Court had concluded that they were protected by its mantle, a legislator may be required to disgorge documents or provide other information in appropriate circumstances. *See, e.g., Village of Arlington Heights,* 429 U.S. at 268 ("In some extraordinary instances [legislators] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."); *Carver,* 102 F.3d at 104 ("judicial inquiry of legislative motive is not per se forbidden.").

2. Legislative Privilege

Whether the privilege that the legislator-defendants seek to assert is characterized as a legislative or a deliberative process privilege, it is, at best, one which is qualified. *In re Grand Jury,* 821 F.2d at 957; *In re Grand Jury Subpoena dated*

August 9, 2000, 218 F. Supp. 2d 544, 553 (S.D.N.Y. 2002). Accordingly, in deciding whether and to what extent the privilege should be honored, the Court must balance the extent to which production of the information sought would chill the New York State Legislature's deliberations concerning such important matters as redistricting against any other factors favoring disclosure. Among the factors that a court should consider in arriving at such a determination are: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. at 583 (internal citations omitted).

In this case, many of the plaintiffs' requests do not seek information concerning the Legislature's apparently brief consideration of a redistricting bill. To the extent that they focus instead on LATFOR's activities, which involved the participation of nonlegislators (at least one of whom evidently was not a governmental employee), their inquiry is arguably less invasive of the Legislature's prerogatives. *See Fla. Ass'n of Rehab. Facs.*, 164 F.R.D. at 267 (recognizing privilege for communications between elected legislators and their "personal staff members," but "less reason for a 'deliberative process' privilege as to legislative employees who provide information to legislators collectively, as, for example, technical employees of a standing committee who do not advise a particular legislator as his or her personal staff.").

In *Marylanders for Fair Representation*, the court acknowledged that any changes that may have been made to a proposed redistricting plan once it reaches the floor of the legislature, and the rationale therefore, fall squarely within the legislative or deliberative process privilege. *Marylanders for Fair Representation*, 144 F.R.D. at 302. Nevertheless, actions which are legislative do not begin only when a bill reaches the floor of the legislature. *Id.* at 300-01. As every high school student

knows, the process of drafting legislation is also an important part of how a bill becomes law.

In this case, the 2002 redistricting plan was developed by LATFOR, an advisory group which, by statute, has the powers of a legislative committee. It does not follow, however, that LATFOR was necessarily acting at the earlier stages of the redistricting process solely as the surrogate of Senator Bruno or other individual members of the Legislature. Moreover, pursuant to its own prior enactment, the Legislature introduced into the process as mandatory participants two non-legislative members of LATFOR. By delegating the complex process of developing a redistricting plan in this manner, the Legislature created a working group which, by statute, necessarily contained legislative "outsiders." While the political reality may be that these "outsiders" are consummate insiders (Dr. Hedges, for example, also serves as the Secretary of an Assembly committee), the fact that LATFOR was constituted in this fashion tends to weaken any claim that the disclosure of LATFOR's deliberations and documents would cause future members of the Legislature not to engage in frank discussions of proposed legislation. Indeed, the legislatively-mandated structure of LATFOR makes its workings more akin to a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation--a session for which no one could seriously claim privilege.

Turning to the relevance of the LATFOR materials, the defendants suggest that the scales tip in their favor because federal courts "*routinely* resolve questions of whether a law has an unconstitutional purpose ... without compelling testimony by legislators or allowing discovery into confidential legislative materials." (Defs.' Letter at 11) (emphasis in original). They note further that many of the plaintiffs' claims arise under Section 2 of the Voting Rights Act, which, as amended, looks to the discriminatory results of a reapportionment plan, not the legislature's allegedly discriminatory purpose, in determining whether a plan should be upheld. (*Id.* at 13). While evidence of discriminatory animus may not be an essential element of all of

the plaintiffs' claims, it certainly is something that can be considered in deciding whether the New York Legislature's 2002 redistricting plans pass judicial muster. *See, e.g., Village of Arlington Heights*, 429 U.S. at 268 ("contemporary statements by members of the decisionmaking body, [and] minutes of its meetings or reports" may be "highly relevant" in "determining whether racially discriminatory intent existed"); *Irvin*, 127 F.R.D. at 171 (noting that after the 1982 amendments to the Voting Rights Act, "circuit courts have held that plaintiffs may carry their burden by fulfilling *either* the more restrictive intent test or the results test") (quoting *McMillan v. Escambia County*, 748 F.2d 1037, 1046 (5th Cir. 1984)) (internal quotation marks omitted). The defendants also have not shown that this evidence could be obtained through other means. Their argument that the discovery sought by the plaintiffs is either irrelevant or unnecessary is consequently unavailing.

Additionally, although this suit is not brought on behalf of the United States, there can be no question that it raises serious charges about the fairness and impartiality of some of the central institutions of our state government. This, too, suggests that the qualified legislative or deliberative process privilege should be accorded only limited deference.

Finally, I note that the portion of this action which challenges the State Senate districts was commenced in state court pursuant to Section 4221--a provision which required that Senator Bruno and Speaker Silver be served with process. Following its removal to this Court, neither of these defendants sought to have the Complaint dismissed as against them on legislative immunity grounds. Although the legislator-defendants contend that Section 4221 obligates them to remain in this suit, this is by no means clear. The express terms of the statute require only that certain state officials be given notice of the suit through service of process. This does not necessarily compel their participation in the suit as parties.[6] Thus, as in

[6] The Federal Rules of Civil Procedure, for example, require that service of process on the United States be effected by delivering a copy to the United States Attorney, or his designee, in the district where the action is brought,

Powell, the legality of the redistricting plan enacted by the Legislature could conceivably have been fully explored in a suit which named as a defendant only the Governor, the executive charged with its execution. *See Powell*, 247 F.3d at 529 (Roth, J., concurring). It also bears mention that another defendant in this suit is the New York State Attorney General. Even if the Attorney General does not have a statutory duty to defend this suit, *see* N.Y. Exec. L. § 71 (McKinney 2001), the fact remains that he has answered the Complaint and is participating in the defense. (*See* Docket No. 214).

For all these reasons, I conclude that the plaintiffs' motion to compel should be granted insofar as it seeks information concerning the operations of LATFOR which is not protected by a privilege other than the legislative privilege. Conversely, to the extent that the plaintiffs seek information concerning the actual deliberations of the Legislature--or individual legislators--which took place outside LATFOR, or after the proposed redistricting plan reached the floor of the Legislature, the motion must be denied. *Cf. Corporacion Insular*, 709 F. Supp. at 292, 296-97 (allowing document discovery, but not depositions of legislators or their aides).

3. Waiver

A more extensive disclosure of information would, of course, be warranted if the defendants waived their claim of privilege through their participation in this action. While the burden with respect to this issue ordinarily rests with the proponent of the privilege, who must establish its nonwaiver, *see United States v. Weissman*, Docket No. S1 94 Cr. 760(CSH), 1996 WL 737042, at (S.D.N.Y. Dec. 26, 1996) (collecting cases), the defendants in this action have made a colorable claim that

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sending a copy to the Attorney General, and when the order of an officer or agency of the United States is challenged, sending an additional copy to the officer or agency. *See* Fed.R.Civ.P. 4(i) (1). This does not require that any person other than the United States actually be named as a defendant in such a suit.

Section 4221 requires their continued participation. In the absence of any case law establishing that their interpretation of the statute is incorrect, I decline, at least at this juncture, to find that they have waived their qualified privilege in its entirety.

4. Senator Bruno's Privilege Assertions

As I indicated to counsel during our recent telephone conference, Senator Bruno's privilege log is in many respects insufficiently specific to permit one to determine whether particular documents are privileged or not. (*See* Pls.' Ex. 4). For example, one document on the privilege log, which is said to be protected by both the legislative and attorney-client privileges, is described only as an "Internal Memorandum (computer file)" concerning "Potential changes to Senate Districts." (*Id.* at 1). Without further details, it is impossible for the plaintiffs to consider--or this Court to determine--whether this is document was prepared during the course of LATFOR's work or at a later stage once the redistricting plan was formally before the Legislature. Moreover, to the extent that attorney-client privilege is claimed, the defendants have not even indicated the name of the attorney or the person with whom the attorney was communicating.[7]

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[7] As the plaintiffs correctly point out, the opaqueness of Senator Bruno's log is particularly troubling insofar as attorney-client privilege is concerned since the defendants arguably may have waived their right to assert that privilege by choosing to publish on the LATFOR website a memorandum concerning the size of the Senate which Michael Carvin, who serves as Senator Bruno's counsel in this action, sent to Senators Bruno and Skelos on or about March 7, 2002. (*See* http:// latfor.state.ny.us/docs/20020308) (last visited July 25, 2003). In that memo, which apparently was prepared less than one month before the redistricting bill was introduced in the Senate and Assembly, Mr. Carvin concludes, "[a]fter examining the relevant provisions of the New York Constitution, case law and historical evidence, ... that the best way to implement the New York and federal requirements governing apportionment" is to make changes in several downstate counties which, if adopted, would increase the size of the New York State Senate from 61 to 62 senators. (*Id.*). This one-member change forms the basis for many of the plaintiffs' allegations of discriminatory animus in this action. (*See* Compl. ¶¶ 102-04; Tr. of June 20, 2003 oral argument (remarks of Richard Emery, Esq., terming this last minute change "very suspicious")).

Although the log is plainly insufficient to sustain the defendants' burden of establishing a basis for their assertions of privilege, it does comply with the minimal burdens imposed by Rule 26(b) (5) of the Federal Rules of Civil Procedure and Local Civil Rule 26.2(a) (2). Greater detail obviously is necessary now that the defendants' withholding of many of the documents that the plaintiffs seek has been found unjustified.

Due to the schedule set by the three-judge court, time is of the essence. For this reason, I previously instructed counsel to confer informally, even in advance of the issuance of this Opinion and Order, with regard the discoverability of particular documents on Senator Bruno's initial privilege log. Additionally, I advised counsel that, to the extent that their disagreements concerning privilege could not be resolved informally, the defendants would have to submit a more detailed log, accompanied by such additional evidence as may be necessary to sustain their burden of establishing that each document withheld is, in fact, subject to an evidentiary privilege that this Court has recognized. *See generally A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, Docket No. 97 Civ. 4978 (LMM) (HBP), 2002 WL 31385824, at *6 (S.D.N.Y. Oct. 21, 2002) (recommending a similar procedure). To ensure that the parties and the Court can have a meaningful discussion, each document on any revised privilege log should also be Bates numbered or otherwise separately identified.

A further pretrial telephone conference has been scheduled for July 31, 2003, at 5:00 p.m. The defendants are instructed to serve their revised privilege log by that time. During the conference, in addition to any other issues that the parties may wish to raise, the Court will consider the method by which any lingering privilege disputes will be resolved.

IV. Conclusion

The plaintiffs' letter-motion to compel is granted in part and denied in part. The legislator-defendants' claims of legislative or deliberate process privilege are sustained only

insofar as the plaintiffs seek to intrude on deliberations or discussions which took place after the proposed 2002 redistricting plan reached the Legislature's floor. Accordingly, the defendants are instructed to respond to the plaintiffs' discovery requests concerning LATFOR, unless they contend that another privilege is applicable. If the legislator-defendants continue to claim privilege with respect to any of the documents on Senator Bruno's privilege log, counsel shall confer in an effort to resolve their differences. If the privilege concerns raised by the log cannot be resolved informally, the defendants are instructed to serve a revised privilege log before the July 31, 2003 telephone conference.

SO ORDERED.

DATED: New York, New York
July 28, 2003

_____/s/_____
FRANK MAAS
UNITED STATES MAGISTRATE JUDGE

United States District Court
S.D. New York

Eric RODRIGUEZ, et al.
v.
George E. PATAKI, et al.

Howard T. ALLEN, et al.
v.
George E. PATAKI, et al.

No. 02 CIV. 618, 02 CIV. 3239.

Aug. 18, 2003

ORDER

BERMAN, District Judge.

I. Background

On July 28, 2003, United States Magistrate Judge Frank Maas, to whom this matter has been referred to oversee discovery, issued an Opinion and Order ("Magistrate Judge Maas's Order"), granting in part and denying in part Plaintiffs' motion, dated July 3, 2003, 280 F. Supp. 2d 89 to compel the production of certain documents and interrogatory responses relating to the development of New York State's 2002 Senate and Congressional redistricting plans. Magistrate Judge Maas's Order granted Plaintiffs' motion insofar as Plaintiffs seek "information concerning the operations of LATFOR [that] is not protected by a privilege other than the legislative privilege" and denied Plaintiffs' motion "to the extent they seek information concerning the actual deliberations of the Legislature--or

individual legislators--[that] took place outside LATFOR, or after the proposed redistricting plan reached the floor of the Legislature."[1] (Magistrate Judge Maas's Order at 103.) On August 6, 2003, Defendants submitted objections to Magistrate Judge Maas's Order ("Defendants' Objections"). On August 11, 2003, Plaintiffs submitted a response to Defendants' Objections ("Plaintiffs' Response"). For the reasons set forth below, the Court affirms Magistrate Judge Maas's Order.

II. Standard of Review

When considering objections to a discovery order issued by a magistrate judge, the Court "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see* 28 U.S.C. § 636(b)(1)(A); *Thompson v. Keane*, 95 Civ. 2442, 1996 WL 229887, at *1 (S.D.N.Y. May 6, 1996); *see also Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990). An order is "clearly erroneous" only when "'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Thompson*, 1996 WL 229887, at *1 (citation omitted); *see also Siao-Pao v. George*, 90 Civ. 5376 (PKL), 1992 WL 36184, at *2 (S.D.N.Y. Sept. 10, 1992). An order is "contrary to law" when it " 'fails to apply or misapplies relevant statutes, case law or rules of procedure.'" *Thompson*, 1996 WL 229887, at *1 (citation omitted).

III. Analysis

The Court has reviewed the record herein including, among other things, Magistrate Judge Maas's Order, Defendants' Objections, and Plaintiffs' Response, as well as relevant legal authorities.[2] The Court concludes that Magistrate

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[1] "LATFOR" refers to a six member legislative "advisory Task Force on Demographic Research and Reapportionment," which consists of four legislators and two non-legislators. (*Id.* at 92.)

[2] Although not contemplated in Fed.R.Civ.P. 72, on August 13, 2003, Defendants submitted a "Reply in Further Support of Objections" ("Defendants' Reply"). *See Alexander v. Evans*, 88 Civ. 5309 (MJL), 1993 WL 427409, at *4 (S.D.N.Y. Oct.15, 1993). In any event, Defendants' Reply does

Judge Maas's Order is neither contrary to law nor clearly erroneous. *See Thomas E. Hoar*, 900 F.2d at 525; *see also Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 74 (N.D.N.Y. 2000).

The Court has reviewed Magistrate Judge Maas's legal conclusions de novo. *Accord Orange v. County of Suffolk*, 855 F. Supp. 620 (E.D.N.Y. 1994). Magistrate Judge Maas correctly analyzed the law pertaining to legislative privilege. He concluded that legislative privilege is "not absolute," (Magistrate Judge Maas's Order at 103) (citing *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) ("[S]uch privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides.")); *see also Manzi v. DiCarlo*, 982 F. Supp. 125, 131 (E.D.N.Y. 1997), and that "the Court must balance the extent to which production of the information sought would chill the New York State Legislature's deliberations concerning such important matters as redistricting against any other factors favoring disclosure." (Magistrate Judge Maas's Order at 100.) Appropriate factors Magistrate Judge Maas considered include: " '(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.' " (Magistrate Judge Maas's Order at 101) (quoting *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979)). Magistrate Judge Maas appropriately balanced these factors and concluded that limited information sought by Plaintiffs is discoverable. *See In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. at 583.

The Court, upon the rather narrow circumstances presented here, affirms Magistrate Judge Maas's Order. "[T]he narrow issue presented is whether Senator Bruno, Speaker

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not affect the conclusion in this Order.

Silver, and the other legislator-defendants are entitled to resist the limited discovery ... sought by the plaintiffs on the basis of the qualified legislative privilege." (Magistrate Judge Maas's Order at 96.) Magistrate Judge Maas's Order does not relate to "any depositions of legislators or their staffs." (*Id.*); *see also id.* at 103 (citing *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 296-97 (D.P.R. 1989).) Nor does it "determine whether Senator Bruno, Speaker Silver, and the remaining legislator-defendants are entitled to claim legislative immunity on the facts of this case." (Magistrate Judge Maas's Order at 100.)[3] And, Magistrate Judge Maas's Order, by its terms, does not extend to instances where LATFOR was acting "solely as the surrogate of Senator Bruno or other individual members of the Legislature." (*Id.* at 101.)

IV. Conclusion and Order

For the reasons stated herein, the Court affirms Magistrate Judge Maas's Order. Judges Walker and Koeltl concur with this result.

DATED: New York, New York
August 18, 2003

/s/
RICHARD M. BERMAN
UNITED STATES DISTRICT JUDGE

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[3] Similarly, Magistrate Judge Maas's Order does not determine whether Defendants waived their claim of legislative privilege. (Magistrate Judge Maas's Order at 103) ("I decline, at least at this juncture, to find that they have waived their qualified privilege in its entirety.").

United States District Court
S.D. New York

Eric RODRIGUEZ, et al.
v.
George E. PATAKI, et al.

Howard T. ALLEN, et al.
v.
George E. PATAKI, et al.

No. 02 Civ. 618, 02 Civ. 3239

Sept. 11, 2003

MEMORANDUM DECISION

MAAS, Magistrate J.

In these related cases, the plaintiffs and plaintiff-intervenors (together, "plaintiffs") challenge the New York Legislature's 2002 State Senate and Congressional redistricting plans. The three-judge court has referred the supervision of pretrial discovery to me. By Opinion and Order dated July 28, 2002 ("July Opinion" or "July Op."), I granted in part and denied in part a motion filed by the plaintiffs to compel the production of certain documents which the defendants contended were shielded from disclosure on the basis of legislative privilege. Certain discovery issues arising out of the practical application of that decision have now been presented to the Court for resolution.

Background

Familiarity with the July Opinion is presumed. For present purposes, it is sufficient to note that the July Opinion determined that the defendants' qualified legislative privilege

was overcome to the extent that the plaintiffs sought information concerning the "operations" of the New York State Task Force on Demographic Research and Reapportionment ("LATFOR"). (July Op. at 26). The defendants' assertions of legislative privilege nevertheless were upheld to the extent that the plaintiffs sought documentation reflecting the thought processes of individual legislators "which took place outside LATFOR or after the proposed [2002] redistricting plan reached the floor of the Legislature." (*Id.*).

The discussion of LATFOR and its operations in the July Opinion was based primarily on publicly-available materials such as the LATFOR website. Since the July Opinion was issued, the plaintiffs have made further submissions to the Court concerning LATFOR's operations. This subject was also addressed in the deposition of Mark A. Burgeson, a LATFOR employee since 1980, who currently serves as a Special Assistant to LATFOR Co-Chairman Skelos. The Burgeson deposition was taken pursuant to Court order on Friday, September 5, 2003.[1]

The additional materials that the Court has reviewed establish that LATFOR's actual structure and operations differ in certain respects from what the enabling legislation and other public documents suggested. As Burgeson explained at his deposition, for eight or so years out of every decade, LATFOR functions as a nonpartisan body which collects election data and compiles it in a central computerized database. (Burgeson Dep. at 21-25). Following each recent decennial Census, however, this method of operation has changed somewhat for

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[1] Late last week, the defendants gave written notice that Burgeson will be one of their expert witnesses at trial, where he is expected to testify about "traditional redistricting principles in New York, including the extent to which the 2002 Senate plan and Plaintiffs' various alternative plans objectively comply with those principles." (*See* letter from Michael A. Carvin, Esq. to Richard D. Emery, Esq., dated Sept. 5, 2003, at 1). Whether the scope of Burgeson's proposed expert testimony will require the disclosure of any additional documents is not an issue which is presently ripe for consideration.

a period of time. (*Id.* at 38). For example, in or around June 2001, LATFOR created four separate redistricting offices: one each for the Senate and Assembly majorities and the Senate and Assembly minorities. (*Id.* at 30-32 & Ex. 2 at 1). In addition, Burgeson moved from his regular LATFOR office at 250 Broadway in lower Manhattan to the separate Senate majority redistricting office located on the same floor. (*Id.* at 52-53 & Ex. 2). A few months earlier, Burgeson also began to report to Senator Skelos, Senator Bruno's legislative appointee to LATFOR, rather than Debra A. Levine, LATFOR's Executive Co-Director, to whom he previously had reported. (*Id.* at 13-14, 37). Working from the Senate majority office, and in consultation with Senator Skelos and the other Republican state senators, Burgeson worked on a Senate majority redistricting plan, which eventually became, with only minor modifications, LATFOR's State Senate redistricting plan. (*Id* . at 40, 83- 84).

Although the members and staff of LATFOR traveled throughout the state in 2001 to conduct public hearings, the Senate redistricting plan was developed exclusively within the confines of the Senate majority redistricting office, which did not share details of it with non-Republicans. (*Id.*). Indeed, Senator Dolinger, one of the minority party representatives on LATFOR, did not see the Senate redistricting plan ultimately proposed to the Legislature by LATFOR until it was unveiled at a public LATFOR meeting in April 2002. (*Id.* at 83-85). In keeping with this secrecy, while he was working on the Senate redistricting plan, Burgeson's business contacts with Levine were "almost nil." (*Id.* at 18).

From these facts, the plaintiffs and defendants draw markedly different conclusions. The plaintiffs maintain that the Senate majority has impermissibly distorted a redistricting process that the Legislature originally expected would be bipartisan and open to public scrutiny. They argue that, despite this end run, the Senate plan was created using LATFOR personnel and resources, and that any information regarding its development consequently falls squarely within my prior ruling that information concerning the "operations" of LATFOR

must be disclosed. For their part, the defendants maintain that the procedures that were employed to redistrict the Legislature simply reflect the fact that redistricting is an inherently political process, in which any majority party inevitably seeks to maximize its existing electoral advantage. The defendants note that the Republican and Democratic parties each are both beneficiaries and victims of this process because each controls one chamber of the Legislature and can therefore exclude its adversary from any meaningful participation in the drawing of new district lines for that chamber.

Discussion

In pressing for further discovery regarding the development of the Senate majority redistricting plan, the plaintiffs focus on the qualified nature of the legislative privilege and evidence which, in their view, indicates that the plan was not developed "outside LATFOR." The defendants oppose this discovery on the theory that the Senate majority redistricting office really functioned as Senator Bruno's surrogate in furtherance of a political process which is entitled to qualified protection in accordance with the July Opinion. In making this argument, the defendants focus on language in the three-judge court's order affirming the July Opinion which suggests that materials prepared while LATFOR was acting "solely as the surrogate of Senator Bruno or other individual members of the Legislature" need not be produced to the plaintiffs. (*See* Docket No. 232 (Order dated Aug. 18, 2003) at 4).

I have reviewed each of the disputed documents *in camera*. These documents fall into three principal categories. The first category consists of numerous requests by Republican legislators to adjust the lines of their districts in ways which they believe will enhance their chances (or those of their successors) to prevail in future elections. Notwithstanding the plaintiffs' protestations, these partisan requests are plainly more akin to private discussions among legislators or between individual legislators and their aides than they are to the regular operations of a bipartisan and bicameral legislative reapportionment commission. Accordingly, they fall within the

my prior ruling that legislative deliberations need not be disclosed. (*See* July Op. at 26).

Moreover, the plaintiffs have not established a substantial need for these documents. If particular Senate election district lines were adjusted following the 2000 Census, it is apparent that the changes must have been made at the behest of the Senate majority since, as a practical matter, the Senate minority was not able to influence the final plan submitted to the Legislature by LATFOR. The fact that a State Senator may have sought to alter the lines of his or her election district in a particular manner obviously might provide considerable political ammunition to a challenger. Nevertheless, the disclosure of documents reflecting that request would add nothing to the discussion of the legality of the Senate majority's final plan if, as is generally the case, the request was couched in political rather than racial or ethnic terms.

For these reasons, I do not believe that a sufficient showing has been made to warrant the production of most of the documents within this category. The one exception is a December 13, 2001, memorandum from Burgeson to Senator Skelos regarding the concerns of a State Senator in Queens. (This memorandum was produced on CD-rom and consequently bears no "Bates" number.) In the memorandum, there is a discussion of the "removal of black population" from a Senate district in Queens. For that reason, I find with respect to this document that the qualified privilege must yield to the plaintiffs' need for information.

The second category of documents sought by the plaintiffs relates to the decision to increase the size of the Senate from 61 to 62 senators. The plaintiffs contend that the documents regarding this increase will help establish the diminution of downstate minority voters electoral clout. The defendants argue that the increase in the size of the Senate is irrelevant to any of the issues before the three-judge court because the plaintiffs' experts have not suggested that any minority voters were prejudiced by the change.

On August 27, 2003, during a telephone conference with counsel, I directed that certain documents relating to a prior proposed increase in the size of the Senate following the 1990 Census be disclosed. (*See* Aug. 27, 2003 Tr. at 40). Counsel have brought to my attention the fact that there are additional documents which address this issue in connection with the 2002 redistricting. Although the disputed documents were prepared in the Senate majority redistricting office and did not enjoy wide circulation, the issue of the Senate's size was the subject of a memorandum to Senators Skelos and Bruno prepared by Michael A. Carvin, Esq., the Senate majority's outside counsel. Indeed, that memorandum was posted on the LATFOR website. (*See* July Op. at 27n.7; http://latfor. state .ny.us/docs/20020308 (last visited Sept. 10, 2003)). Even if the decision to post that memorandum on the Internet did not waive the defendants' privilege with respect to other similar documents, it does show that the proper size of the Senate was not an issue that the Senate majority sought to keep carefully cloistered within the confines of its separate redistricting office. Accordingly, the defendants are directed to turn over to the plaintiffs any documents relating to the decision to increase the size of the Senate in connection with the 2002 redistricting.

Finally, the plaintiffs seek the production of certain expert reports cited in LATFOR's "Section 5" submission to the United States Department of Justice ("DOJ") for preclearance of the 2002 State Senate Senate redistricting plan. (*See* letter from Mr. Emery to the Court, dated Sept. 4, 2003, at 1-2). The LATFOR submission, which was assembled with the assistance of LATFOR's co-executive directors, refers in several places to "our experts." One typical statement, relating to Senate District 18, indicates that "our experts concluded that African-Americans will continue to elect their preferred candidates without difficulty." (*See id* . at 1). Despite these references, it does not appear that the experts' reports were ever made available to DOJ. Nevertheless, the Section 5 submission plainly referred to the experts as LATFOR's experts, not as the Senate majority's experts. In addition, the April 30, 2002, letter

transmitting the redistricting plan for preclearance was written on LATFOR stationery and signed by Senator Skelos, a Republican, and Assemblyman Parment, a Democrat, as LATFOR's co-chairmen. (*Id.* (Attach.)). For these reasons, I conclude that the experts' reports were not prepared for the Senate majority, but, rather, in the ordinary course of LATFOR's operations. These reports, which were never listed on the defendants' privilege logs, consequently must be produced.

One final issue relating to documents merits discussion. In the course of its work, LATFOR made available to all four redistricting offices a statistical software package, known as SAS, which could be used in connection with racial block voting analyses of Census and other data. (*See* letter from Mr. Emery to the Court, dated Sept. 3, 2003 ("Sept. 3 Letter"), at 5; Burgeson Dep. at 79- 80). During his deposition, Burgeson testified that Isaac Fefer, a LATFOR Senior Demographer and SAS Programmer, wrote certain SAS macros or subroutines ("programs") to help produce such statistical reports. (*See* Burgeson Dep. at 79-80). According to Mr. Emery, these programs, which were not listed on the defendants' privilege logs, have been withheld from production. (*See id.*; Sept. 3 Letter at 5. *See also* Sept. 3, 2003 Tr. at 35-36). If so, because they plainly relate to the operations of LATFOR, these programs must be produced.

Conclusion

The defendants are directed to produce to the plaintiffs within two days (1) any previously withheld documents which relate to the decision to increase the size of the New York State Senate in 2002, (2) the December 13, 2001 memorandum from Burgeson to Senator Skelos, (3) any expert opinions referred to in LATFOR's DOJ submission which were prepared prior to April 30, 2002, and (4) any SAS macros, subroutines or programs which may be used in connection with racial block voting analyses of Census or other data.

SO ORDERED.

DATED: New York, New York
September 11, 2003

_____/s/_____
FRANK MAAS
UNITED STATES MAGISTRATE JUDGE

United States District Court
S.D. New York

Eric RODRIGUEZ, et al.
v.
George E. PATAKI, et al.

Howard T. ALLEN, et al.
v.
George E. PATAKI, et al.

Nos. 02 CIV. 618, 02 CIV. 3239

Sept. 22, 2003

DISCOVERY ORDER

MAAS, United States Magistrate Judge.

Discovery in this case is scheduled to end on September 26, 2003. As the deadline nears, the parties have inundated the Court with motion papers. I attempted to contact lead counsel earlier this week to provide oral rulings with respect to at least some of the parties' concerns, but was unable to set up a telephone conference. Accordingly, this Discovery Order sets forth my disposition of each remaining issue of which I am aware.

A. *Burgeson and Morrison Expert Reports*

Following the referral of these cases to me, the plaintiffs sought to substitute Professor Michael McDonald as one of their racial block voting experts. The defendants did not object to this request, but asked that they be given additional time to submit their rebuttal reports. In an effort to keep discovery moving, I directed that the defendants serve any of their

rebuttal expert reports which were "not affected" by the plaintiffs' change of experts by August 26, with their remaining reports to be served by September 12, 2003. (*See* Docket No. 236 (Order dated Aug. 20, 2003)). Thereafter, the defendants did not serve any expert reports in August.

Having reviewed the reports served in September, the plaintiffs contend that the expert reports of Mark Burgeson, a LATFOR staff member, and Peter A. Morrison, a demography consultant, do not respond to Professor McDonald's racial block voting analysis and are therefore untimely. (*See* letter dated Sept. 16, 2003, from Richard D. Emery, Esq., to the Court, at 1-2). Accordingly, the plaintiffs ask that the Burgeson and Morrison reports be stricken, and that these witnesses be precluded from testifying. In their opposing papers, the defendants deny the plaintiffs' allegations regarding their purported noncompliance with my order. (*See* letter dated Sept. 18, 2003, from John R. Braatz, Esq., to the Court, at 2-4). Additionally, the defendants have cross-moved to strike any portions of the McDonald report which do more than correct errors in the ecological inference calculations of the plaintiffs' former racial block voting expert. The prior expert's errors in connection with those calculations were the basis for the plaintiffs' original application to substitute a new expert.

The decision to strike an expert's report is obviously one which should not be made without a showing of good cause. Here, the defendants argue that they were entitled to delay the production of all of their expert reports because the plaintiffs' belated production of the McDonald report adversely "affected" their pretrial planning. (*See id.* at 4). They cite as an example their need to "reschedule depositions ... while preparing for impending discovery and summary judgment deadlines." (*Id.*). This strained reading of the August 20 order clearly does not justify the defendants' delay.

The defendants also argue, however, that the McDonald report necessitated substantive changes in the Burgeson and Morrison reports which entitled them to delay their delivery. In an effort to determine whether this argument holds water, I

reviewed all three reports. Although the Morrison and Burgeson rebuttal reports appear to address the question of racial block voting only tangentially, the plaintiffs have not established that the decision to delay the delivery of the Burgeson and Morrison reports constitutes a clear and knowing violation of my order. Accordingly, while it certainly appears that the defendants have engaged in some gamesmanship, their conduct does not warrant the drastic remedy of striking the Morrison and Burgeson reports.

By the same token, although the plaintiffs withdrew their original racial block voting expert's report because it contained certain errors regarding ecological inference, Mr. Emery never represented that the changes in a substitute report would be limited to that area. There consequently is no basis for this Court to strike any aspect of the McDonald report.

B. *Burgeson Deposition*

On September 5, 2003, pursuant to Court order, the plaintiffs deposed Mark Burgeson as a fact witness in an effort to shed further light on the workings of LATFOR. The following week, the defendants served the Burgeson expert report, which addresses the impact of the 2002 Senate redistricting plan, of which he was a principal architect, on minorities. By agreement among counsel, Burgeson was scheduled to be deposed as an expert witness on September 19, 2003, but, on the eve of that deposition, the defendants unilaterally cancelled his appearance, stating that their decision to do so was based upon the plaintiffs' "request that the Court preclude his trial testimony and strike his expert report from the record." (*Id.* at 4).

The Burgeson expert witness deposition should not have been cancelled. Nevertheless, the defendants' decision to designate him as an expert does not amount to a waiver of their legislative privilege with respect to any documents on Senator Bruno's privilege log that I previously have held need not be disclosed. His designation as an expert also does not open the door for the plaintiffs to inquire into the reasons why he and

others in the Senate majority redistricting office drew the lines for particular Senate districts in the ways that they did.

Mr. Carvin previously had agreed that Burgeson could be deposed as an expert, subject to any privilege claims that the defendants were entitled to assert. (*See* Sept. 11, 2003 Tr. at 29) ("If you want to depose him next week as an expert, that's fine."). Instead of proceeding in that manner, however, the defendants chose to cancel the Burgeson deposition without consulting the Court. Because there was no legitimate basis for that decision, the defendants are directed to make Burgeson available *at the plaintiffs' convenience* prior to the discovery deadline.

C. *Other Delayed Depositions*

It appears that the plaintiffs themselves delayed several fact witness depositions because the parties' objections to certain of my rulings concerning document discovery had not yet been resolved by the three-judge court. Recognizing that such delays were a luxury that the parties could ill afford, I expressly cautioned counsel, during a September 11, 2003, telephone conference, to "do as much of [each] deposition as you can and then if there are rulings that result in [the] disclosure of further documents, finish it up." (*See* Sept. 11, 2003 Tr. at 11). At other times, I stated that the parties' depositions would have to be conducted on multiple tracks to meet the discovery deadline. Despite these remarks, and Judge Berman's clear indication that the September 26 discovery deadline would not be further extended, it appears that relatively few fact witnesses have been deposed. Counsel are therefore instructed to confer *immediately* to develop a schedule for this last week of discovery which ensures that the maximum number of key fact witnesses are deposed.

D. *Angelo Falcone Report*

In prior conferences, Mr. Carvin agreed that the defendants would not object to the submission of a revised expert report by expert witness Angelo Falcone, provided that it did nothing more than annex material which was referenced

in his original report. The defendants maintain that the revised Falcone report submitted by PRLDF goes far beyond the limited modifications that the defendants agreed were acceptable. (*See* letter dated Sept. 16, 2003, from Louis K. Fisher, Esq., to the Court).

The original Falcone report referred to official New York State government reports which allegedly acknowledge that discrimination is a significant problem for Latinos. In the revised report, the two additional paragraphs to which the defendants object indicate that Latinos in New York City have historically been the victims of discrimination in many aspects of their lives. Of far greater importance, Mr. Falcone relies upon a number of documents not previously referenced in his report, including an extensive study of the relationship between the Latino community and New York City government.

As the defendants correctly observe, through this subterfuge the revised report significantly expands the potential scope of Mr. Falcone's expert testimony. Although PRLDF contends that the defendants have suffered no prejudice because they had three weeks to prepare and serve their rebuttal report, this argument wholly misses the mark. The only modification of the report that the Court allowed was a nonsubstantive one. The changes that actually were made could substantially alter Mr. Falcone's testimony and, therefore, violate the limited leave granted by the Court with the defendants' consent.

Accordingly, the revised Falcone report is stricken. Mr. Falcone may, of course, testify at trial with respect to the more limited opinions set forth in his original report.

E. *Addition of Congressman Meeks as a Defense Witness*

On August 7, 2003, the defendant-intervenors served a Rule 30(b)(6) deposition notice on plaintiff COBED. The notice sought the testimony of a COBED representative concerning several topics, including COBED's decision to intervene in this litigation. In their notice, the defendants instructed COBED to

produce "the person or persons most knowledgeable" about these subjects. Thereafter, at the deposition, Assemblywoman Annette Robinson testified on behalf of COBED that Congressman Gregory Meeks was the person most knowledgeable about several of the subjects set forth on the deposition notice. Based on this testimony, the defendant-intervenors seek to add the Congressman to their witness list. (*See* Sept. 19, 2003 letter from Cassandra F. Lentchner, Esq., to the Court).

Notwithstanding the wording of the Rule 30(b)(6) notice, it is settled law that a party need not produce the organizational representative with the greatest knowledge about a subject; instead, it need only produce a person with knowledge whose testimony will be binding on the party. *See Gucci Am., Inc. v. Exclusive Imports Int'l*, 2002 WL 1870293, at *8-*9 (S.D.N.Y. Aug.13, 2002) (Casey, J., *aff'g* Maas, Mag. J.); *Cruz v. Coach Stores, Inc.*, 1998 WL 812045, at *6 (S.D.N.Y. Nov.18, 1998), *aff'd in part, vacated in part on other grounds*, 202 F.3d 560, 573 (2d Cir. 2000). In their papers, the defendant-intervenors have not shown that Assemblywoman Robinson was insufficiently knowledgeable to serve as COBED's Rule 30(b)(6) witness. Accordingly, the fact that Congressman Meeks may have been a better witness does not warrant his addition to the witness list at this late date.

F. *Disqualification of Dr. Lisa Handley*

One of the plaintiffs' expert witnesses is Dr. Lisa Handley, whose testimony will likely focus on a statistical racial block voting analysis. The defendants seek to disqualify Dr. Handley because she previously was retained as an expert by both the New York State Assembly and a referee appointed by the state court in the *Allen* action before it was removed to this Court. (*See* Docket No. 226 (Def'ts' Mem. of L.)). (My understanding is that the *Allen* action concerned a Congressional redistricting plan developed by the New York Legislature which is no longer at issue in this litigation.)

The Court has the inherent power to disqualify an

expert witness when such relief is warranted. *Paul v. Rawlings Sporting Goods, Co.*, 123 F.R.D. 271, 277-78 (S.D. Ohio 1988). Where the disqualification is sought because the expert previously was retained by another party, the movant bears the burden of establishing (1) that it was objectively reasonable for the movant to believe that it had a confidential relationship with the expert and (2) that the movant's confidential information was in fact disclosed to the expert. *Topps Co. v. Productos Stani Sociedad Anomina Indus. y Commercial*, 2001 WL 406193, at *1 (S.D.N.Y. Apr. 20, 2001) (Gorenstein, Mag. J.); *Paul*, 123 F.R.D. at 278.

The record establishes that the Assembly formally retained Dr. Handley in 2001 to provide various services, including testimony at "depositions and ... such other appearances in the pre-clearance process or in any ongoing litigation relating to [redistricting] plans as may be requested by the Assembly." (*See* Def'ts' Mem. in Support of Mtn. to Disqualify ("Def'ts' Mem."), Ex. A at 1). The first element of the showing required to disqualify Dr. Handley therefore has been met.

As to the second element, which requires disclosure of confidential information to the expert during the course of the consulting relationship, the defendants' memorandum of law alleges that Dr. Handley was "entrusted with confidential data, analyses and information" concerning the "thought processes" of Assembly employees and one of the Assembly's other "outside experts." (Def'ts' Mem. at 2). As part of their motion papers, the defendants did not proffer any affidavit to support this conclusory assertion. Instead, the defendants pointed to the Assembly's log of privileged documents, suggesting that it established that such confidential communications had occurred. (*Id.* at 5 & Ex. B).

Contrary to the defendants' suggestion, the privilege log does not demonstrate that Dr. Handley received any confidential information that she now seeks to use to their disadvantage. Indeed, many of the "privileged" documents set forth on the log are not privileged at all. (*See, e.g.*, Jan. 8, 2003

email from Dr. Handley to an Assembly employee: "Okay, I drop my sons off at school, but I'm home from 9:30 until 11:30[,] then from noon on."). Others reflect Dr. Handley's thought processes, rather than those of the defendants, and will, if anything, be helpful to the defendants in connection with cross-examination. (*See, e.g.*, July 2, 2001 email from Dr. Handley to an Assembly employee: "I do most of my work in SPSS (double regression, scatterplots, etc[.]), then save a much smaller database out using the report and export functions.")

Although the log contain references to planned meetings with the Assembly's counsel, the underlying documents do not establish that the defendants divulged any privileged or confidential information to Dr. Handley when those meetings took place. Moreover, the notion that Dr. Handley received confidential information regarding the Senate plan during the course of those meetings is belied by the parties' prior motion practice, which established that the Senate and Assembly majority redistricting offices operated as separate fiefdoms, with no interoffice communications of substance. It therefore seems unlikely that the Assembly majority could have given Dr. Handley any confidential information relevant to the Senate redistricting plan.

In an effort to make the requisite showing, the defendants submitted to the Court without authorization a "reply" declaration which alleges that Dr. Handley engaged in communications with "Assembly representatives, including outside counsel and other outside experts," during which she received "confidential" information "regarding [their] analyses, thought processes, and deliberations concerning racial voting patterns in New York." (Decl. of Roman Hedges, dated Sept. 8, 2003, ¶ 4). Even if I were to consider this belated submission, Dr. Hedge's conclusory statements would plainly be insufficient to meet the defendants' burden. *See, e.g., Topps Co.*, 2001 WL 406193, at *2-* 3; *In re Ambassador Group, Inc., Litig.*, 879 F. Supp. 237, 243 (E.D.N.Y. and S.D.N.Y.1994).

The defendants also seek to disqualify Dr. Handley because she was previously retained by a state court referee in

connection with the drafting of New York's Congressional redistricting plan. They maintain that the rules of conduct applicable to a judge also apply to a referee and, by extension, to his agents. (*See* Def'ts' Mem. at 6) (citing *In re Joint Eastern and Southern Districts Asbestos Litig.*, 737 F. Supp. 735, 739 (E.D.N.Y. and S.D.N.Y.1990)). Prior service as a court-appointed expert, however, should not disqualify someone from appearing in similar cases in the future. Here, Dr. Handley's retention by Referee Bialkin related to *Congressional* redistricting, which, does not appear to be the subject of her proposed testimony. Moreover, Dr. Handley has submitted her own sworn statement, in which she avers that in the course of her work for the state court, she "never reviewed, analyzed or gave expert advice [regarding] the Senate plan that is the subject of this litigation." (Decl. of Dr. Lisa Handley, dated Aug. 25, 2003, ¶ 12). Dr. Handley's work for the state court also was completed before the plaintiffs engaged her to testify on their behalf in these cases.

In these circumstances, the defendants have not shown that Dr. Handley's disqualification is necessary to preserve the confidentiality of their thought processes or the public's confidence in the integrity of its judiciary. The motion to disqualify Dr. Handley from testifying on behalf of the plaintiffs is therefore denied.

G. *Objections*

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, parties may file objections to a magistrate judge's rulings concerning nondispositive matters within ten days after being served with a copy of the magistrate judge's order. In this litigation, by agreement of the parties, this time period has in the past been truncated in recognition of the limited time available for discovery. It obviously is not feasible to allow the parties ten--or even three--days to object to the rulings set forth in this Discovery Order since the discovery period will end on Friday, September 26, 2003. Accordingly, unless the three-judge court otherwise directs, counsel are instructed to serve and file their objections, if any, to this Discovery Order by *noon* on

Tuesday, September 23, 2003. Additionally, I note that neither Rule 72 nor 28 U.S.C. § 636(b) contemplates the submission of responses to objections. For that reason, unless the three-judge court otherwise directs, responses to any further objections filed by the parties should not be submitted.

SO ORDERED.

DATED: New York, New York
September 22, 2003

_____/s/_____
FRANK MAAS
UNITED STATES MAGISTRATE JUDGE

United States District Court
S.D. New York

Eric RODRIGUEZ, et al.
v.
George E. PATAKI, et al.

Nos. 02 CIV. 618, 02 CIV. 3239

Sept. 23, 2003

ORDER

BERMAN, District Judge.

I. Background

The Court has received objections to written and oral discovery orders issued by Magistrate Judge Maas between September 3, 2003 and September 11, 2003 ("Magistrate Judge Maas's Orders"). (*See* "Objections of Defendant Senator Joseph L. Bruno to the Decision and Order of Magistrate Judge Maas Dated September 10, 2003" ("Def. Obj.") and "Plaintiffs' Objections to the Privilege Rulings of Magistrate Judge Frank Maas and Requests for Rulings on Unresolved Issues" ("Pl. Obj."), each dated September 17, 2003.) The Court has also received "Senator Bruno's Response to Plaintiffs' September 17, 2003 Objections" and "Plaintiffs' Response to Senator Bruno's Objections to the Privilege Rulings of Magistrate Judge Frank Maas" ("Pl. Response"), each dated September 18, 2003.

II. Standard of Review and Analysis

The Court has reviewed Magistrate Judge Maas's Orders and the parties' submissions and concludes that the Orders are neither clearly erroneous nor contrary to law. Fed. R. Civ. P. 72(a); *see* 28 U.S.C. § 636(b)(1)(A); *Thomas E. Hoar, Inc.*

v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990); *see also Weiss v. La Suisse*, 161 F. Supp. 2d 305, 321 (S.D.N.Y. 2001) ("A magistrate judge's resolution of discovery disputes deserves substantial deference."); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 124 F.R.D. 75, 77 (S.D.N.Y. 1989) (" '[I]n resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused.'").

The Court denies Plaintiffs' and Defendant's requests contained in their objections for rulings on issues not addressed by Magistrate Judge Maas. The Court has referred all discovery disputes in this case to Magistrate Judge Maas and he is in the best position to review them in the first instance. (*See* Order of Reference to a Magistrate Judge, dated Dec. 3, 2002); *see also AML Int'l Ltd. v. Orion Pictures Corp.*, 89 Civ. 2048, 1990 WL 364469, at *6 (S.D.N.Y. Feb. 20, 1990) ("[Defendant] points out that Magistrate Lee has not yet ruled upon [defendant's] objections to that document request, and the court agrees with [defendant] that [plaintiff's] attempt to raise the issue ... is inappropriate."); *Rhodes v. Northwestern Bell Tel. Co.*, 709 F. Supp. 162, 164 (D. Minn. 1987) ("Since the Magistrate specifically noted on page 5 of his order that he had not yet ruled on plaintiffs' entitlement to fees and costs, defendant should raise any objections it has before the Magistrate. His order relating to attorney's fees is not final. If his ruling is adverse to defendant, it can, of course, appeal from such an order.").

In their submissions, the parties make several references to extending the discovery schedule. (*See, e.g.*, Def. Obj. at 7; *id.* at 16 n.5; Pl. Obj. at 14; Pl. Response at 4 ("[T]hrough no fault of Plaintiffs, the discovery deadline is now upon us.").) The discovery deadline, which the Court has extended twice, is of the parties' own making and remains September 26, 2003. (*See* July 7, 2003 Order ("[T]he Court extends the discovery deadline two weeks to September 19, 2003."); Aug. 19, 2003 Order ("[T]he Court extends the discovery deadline to September 26, 2003.").) The Court again reminds the parties that, at the December 30, 2002 conference, the Court urged the parties not to delay

discovery while motion(s) to dismiss were being briefed, cautioning that the parties "might, on the back end start to be bumping up against deadlines and all of a sudden be in a crunch timewise." (Dec. 30, 2002 Tr. at 13.) The parties demurred and elected to postpone discovery. (*Id.* at 12 ("I think we have all agreed that discovery would best be put off until the case is either narrowed or not narrowed ... depending on how the Court rules on the issues ... raised by the defendants on the motions to dismiss.").)

III. Order

For the reasons stated herein, the Court affirms Magistrate Judge Maas's Orders. The parties may need to adopt a more cooperative (with one another) and economical and flexible approach vis-a-vis summary judgment and trial of this case both of which are expected to be completed during November/December 2003.

DATED: New York, New York
September 23, 2003

/s/
RICHARD M. BERMAN
UNITED STATES DISTRICT JUDGE

United States District Court
S.D. New York

Eric RODRIGUEZ, et al., Plaintiffs,
v.
George E. PATAKI, et al., Defendants.

Nos. 02 CIV. 618, 02 CIV. 3239

Sept. 25, 2003

ORDER

BERMAN, District Judge.

I. Background

The Court has reviewed the parties' various objections and responses to objections to Magistrate Judge Maas's discovery orders, dated September 22, 2003, September 23, 2003, and September 24, 2003 ("Magistrate Judge Maas's Orders"), including the following submissions: (i) Plaintiffs' letter to the Court objecting to Magistrate Judge Maas's September 22, 2003 discovery order, dated September 22, 2003, 293 F. Supp. 2d 305, 2003 WL 22989011; (ii) Defendant-Intervenors' Appeal of Magistrate Judge's Order, Dated September 23, 2003 [sic] and Declaration of Cassandra Lentchner in Support of Defendant Intervenor's [sic] Appeal of Magistrate Judge's Order, each dated September 23, 2003; (iii) Objections of Defendant Senator Joseph L. Bruno to the Order of Magistrate Judge Maas Dated September 23, 2003, dated September 24, 2003; (iv) Objections of Defendant Senator Joseph L. Bruno to Magistrate Judge Maas' Order of September 24, 2003, dated September 24, 2003; (v) Plaintiff-Intervenors' "letter and brief in reply to defendant

New York State Assembly and defendants intervenors [sic] objection to Magistrate Judge's September 22, 2003 [sic]," dated September 25, 2003; and (vi) Senator Bruno's Response to Plaintiffs' Objection to Magistrate Judge Maas' September 22, 2003 Order, dated September 25, 2003.[1]

II. Standard of Review and Analysis

The Court has reviewed Magistrate Judge Maas's Orders and concludes that they are neither clearly erroneous nor contrary to law. Fed. R. Civ. P. 72(a); *see* 28 U.S.C. § 636(b)(1)(A); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990); *see also Weiss v. La Suisse*, 161 F. Supp. 2d 305, 321 (S.D.N.Y. 2001) ("A magistrate judge's resolution of discovery disputes deserves substantial deference."); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 124 F.R.D. 75, 77 (S.D.N.Y. 1989) ("'[I]n resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused.'").

III. Order

The Court affirms Magistrate Judge Maas's Orders. Chief Judge Walker and Judge Koeltl concur with this result.

DATED: New York, New York

September 25, 2003

__/s/_____

RICHARD M. BERMAN

UNITED STATES DISTRICT JUDGE

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[1] On September 24, 2003, the Court granted (orally) counsel for the Council of Black Elected Democrats, Inc.'s request to respond to Defendants' objections to Magistrate Judge Maas's September 22, 2003 Order (*see* Letter to the Court from Paul Wooten, dated September 23), directing Mr. Wooten to secure input from all Plaintiffs or Plaintiff-Intervenors. Simultaneously, the Court orally advised counsel for Defendants that they were afforded the same opportunity.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC RODRIGUEZ, ET AL.	)	
	)	
vs.	)	02 Civ. 618 (RMB)
	)	
GEORGE E. PATAKI, ET AL.	)	
HOWARD T. ALLEN, ET AL.	)	
	)	
vs.	)	02 Civ. 3239 (RMB)
	)	
GEORGE E. PATAKI, ET AL.	)	

JUDGMENT

Whereas, on Nov 6, 2003, this three-judge District Court having concluded that the plaintiffs had raised no triable issues of material fact with respect to Counts I, II, IV, and VIII of the Compiaint and granted summary judgment to the defendants on those claims, the Court indicated that an Opinion would follow; following trial, the Court having concluded that the plaintiffs have failed also to establish the claims set forth on Counts III, V and VII and the Court on March 15, 2004, having issued its Opinion (89805) and Order directing the Clerk to enter judgment dismissing each of the claims by the plaintiffs and plaintiff-intervenors, dismissing the complaint and closing the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (89805) and Order dated Mar 15, 2004, judgment is hereby entered dismissing all the plaintiff's and plaintiff-intervenor's claims, dismissing the

complaint and closing the case.

DATED: New York, New York
March 19, 2004

J. MICHAEL MCMAHON
Clerk of Court

By: __/s/_____
Deputy Clerk

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC RODRIGUEZ, ET AL.	)	
	)	
vs.	)	**NOTICE OF APPEAL**
	)	02 Civ. 618 (RMB)
GEORGE E. PATAKI, ET AL.	)	
HOWARD T. ALLEN, ET AL.)		
	)	
vs.	)	02 Civ. 3239 (RMB)
	)	
GEORGE E. PATAKI, ET AL.	)	

Notice is hereby given that Plaintiffs Eric Rodriguez, Martin Malave-Dilan, Howard T. Allen, Jeannette Santos, Donald J. Jirak, Richard Flateau, Charlotte A. Taylor, Mervyn A. Campbell, Sarah Brockus, Patricia McDow, Lisa Best, Victor Oluwole, Ruben Rangel, Russell Velazquez, Guillermo Linares, Isabel Evangelista, Martha Pepin, Marisefa Reyes, Maria Urena, Tyrone Zimmerman, Jose Alvarado, Irvin R. McManus, Wayne Hall, Samuel Prioleau, William Rodriguez, Neville Mullings, Mary Adams, Eugene A. Burnett, Hazel Palmore, and Johnny Velez hereby appeal, pursuant to 28 U.S.C. § 1253, 28 U.S.C. § 2101(b), and United States Supreme Court Rule 18.1, to the United States Supreme Court from the Judgment of the District Court dated and entered on March 19, 2004.

Dated: New York, New York
May 13, 2004 [actually filed May 12, 2004]

By:__/s/_____
Richard D. Emery (RE 5181)
EMERY CELLI BRINCKERHOFF & ABADY LLP
545 Madison Avenue
New York, New York 10022
(212) 763-5000
Attorneys for Plaintiffs

DECLARATION OF ANDREW A. BEVERIDGE

[EXCERPTS]

ANDREW A. BEVERIDGE, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1) This affidavit serves to consolidate some changes to my report filed on August 1, 2003 and add some additional demographic material related to some of the issues that arose during discover.

* * *

General Population Shifts and Redistricting, 1970 through 2000

17) In the 1972 Senate Plan, New York City contained 59% of the population of District 9 (shared with Nassau County), all of Districts 10-34, and 39% of the population of District 35 (shared with Westchester County), a total of 25.98 districts. In the 1982 Plan, New York City contained all of Districts 10 and 12-33, plus 92% of the population of District 11 (shared with Nassau County), and 72% of the population of District 34, a total of 24.64 districts. New York City thus lost 1.34 districts as a result of the relative shift in population. New York City's share of the total number of districts dropped from 43.3% (25.98/60) to 40.4% (24.64/61), almost exactly parallel to its 3% loss of state population percentage.

18) In the 1984 Senate Plan (the 1982 Plan, as corrected for block-on-border violations), every New York City district was just 0.27% (no more than 784 persons) below the statewide ideal of 287,824. The total deviation for the 1984 Plan was 5.21%, and the average deviation was 0.74%. Cumulatively, the 26 districts wholly or partly

within New York City (Districts 10-35) were underpopulated by 20,269 persons – seven percent of an ideal district population. Pl. Ex. 4, Beveridge Report, Table 8. That necessarily means that New York City received a share of the 1984 Senate districts that was almost exactly proportional to its share of the state population. Thus, no attempt was made to under populate the New York City districts to degree that would have preserved the apportionment of districts the City had received under the 1970 census.

19) When the 1992 Senate Plan, which included 61 seats, is analyzed using the population from 2000, the following four results are found. *See* Supplemental Table 3:

a. Two of the nine districts in Long Island would be overpopulated (Districts 1 (by 22,189) and District 3 (by 4,102) the rest would be underpopulated. Together the Long Island Districts would be underpopulated by 45,888. Pl. Ex. 4, Beveridge Report at ¶9.

b. In the general downstate area (Districts 10-36 and 38), seven districts would be underpopulated, but 21 districts would be overpopulated. Together, all 28 districts would be overpopulated some 362,279. Based upon an ideal value of 311,089 this should represent a gain of 1.16 seats for downstate. Pl. Ex. 4, Beveridge Report at ¶10.

c. In the general upstate area (Districts 38 and 39-61), four of the 24 districts would be overpopulated. Three of those are the districts nearest New York City, in the Hudson Valley. The other 20 districts would all be underpopulated according to the 2000 census. Together, all 24 districts would be underpopulated by an aggregate of 316,363. Based upon the ideal value of 311,089, this would translate into a loss of

1.02 Senate seats in the upstate region. Pl. Ex. 4, Beveridge Report at ¶11.[1]

d. Based upon a "benchmark" plan using the 1992 Senate plan and 2000 population, Upstate should lose about one seat; Downstate should gain one seat, and something should be done to absorb the overall underpopulation in Long Island. This would require drawing lines taking into account the population changes recorded in Census 2000. Pl. Ex. 4, Beveridge Report at ¶12.

Preservation of Cores of Districts

20) Supplemental Table 4. Presents information on the preservation of the cores of districts. This table was derived in the following manner:

a. The Burgeson Report gives data, for some districts in the 2002 Senate Plan, and for the Revised Plaintiffs' Plan, for the percentage of each district's population that comes from the single pre-existing (1992 Plan) district from which it takes the largest share of its population. The Burgeson does not give such data in the body of his report for all districts in either plan, but only for: a) all districts north of New York City, not including the Bronx/Westchester districts; b) Long Island; and c) the districts wholly or partly in the Bronx. Df. Ex. 19, Burgeson Report at 16, 20 and 26.

b. Burgeson describes these charts as showing the "Percentage of Population of 1992 Senate Districts contained

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[1]I erroneously counted District 37 as Downstate, for a total of 29 Downstate districts and 23 Upstate. In the Report tables, however, and in later sections of the report based on those tables, old District 37, which runs from northern Westchester through Columbia County, is counted as upstate, with 24 Upstate districts in the 1992 Plan, and 28 Downstate. In fact, the 24 contiguous districts 37 and 39-61 of the 1992 Senate Plan comprise almost exactly the same territory as the 24 2002 Districts 39-62, with the exception of one town in Orange County and one town in Westchester County – the same territory described as Upstate throughout. I have changed the descriptions and corrected the numbers to treat old Districts 10-36 and 38 as Downstate and old 37 and 39-61 as Upstate.

in the most equivalent district in the newly drawn plans." That description is erroneous, however. For example, the figure given District 38 is 100%, and while District 38 can be accurately described as taking 100% of its population from the previously existing (1992 Plan) District 38, not all of the population of old District 38 is in new District 38.

c. Complete statewide data are provided in the table in Df. Ex. 13. That table, however, contains two errors, which are corrected in the Burgeson Report at 16. The figure in column 1 for 2002 Senate Plan District 60 should be 79.98%, not 59.65%; and the figure in column 3 for Revised Plaintiffs' Plan District 60 should be 59.65%, not 39.97%.

21) Statewide, the average district in the 2002 Senate Plan takes 83.5% of its population from a single pre-existing (1992 Plan) district. The average district in the Plaintiffs' Plan takes 67.5% of its population from a single pre-existing district.

22) For Long Island, the respective averages are 96.8% and 64.2%. (The average given in the Burgeson Report at 20 for the Revised Plaintiffs' Plan Long Island districts is 63.2%. The discrepancy results from an arithmetical error by Burgeson. The average value of the figures Burgeson gives for the Revised Plaintiffs' Plan districts is 64.2%).

23) For all the districts wholly or partly within New York City the respective averages are 70.4% and 65.7%.

24) For the districts in the region the Plaintiffs' have characterized as Downstate, the respective averages are 70.7% and 65.3%.

25) For all districts north of New York City, not including the Bronx/Westchester districts, the respective averages are 92.2% and 70.9%.

26) For the region the Plaintiffs characterize as Upstate, the respective averages are 91.8% and 70.4%.

27) For all of the state outside of Long Island, the respective averages are 81.3% and 68.1%.

28) The Revised Plaintiffs' Plan substantially preserves the cores of existing districts: more than two-thirds, on average, statewide and Upstate, two-thirds in the Downstate region as a whole, nearly two-thirds in New York City and Long Island.

* * *

38) The foregoing is based upon the materials noted and relies upon my qualifications as a demographer and social scientist.

39) I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 23, 2003

New York, New York

Andrew A. Beveridge

Andrew A. Beveridge

An Analysis of the 2002 State Senate Redistricting Plan, Alternative Redistricting Plans, Demographic Trends, and Black and Hispanic, Social, Economic and Educational Disparities in New York State

[EXCERPTS]

Andrew A. Beveridge, Ph.D.

Submitted, August 1, 2003

Executive Summary

1) The *2002 Senate Plan* overpopulates every upstate district and underpopulates every downstate district. Thus downstate, the home of about four-fifths of all of the Hispanics and African Americans in New York State is deprived of on one seat.

* * *

4. The *Revised Plaintiffs' Plan*, which does not have the systematic population disparities, provides for an additional district in the Southern Westchester Northern Bronx area, dissolves the minority "packing" and "cracking" in that area, and reunites the minority communities in Nassau and Suffolk counties.

* * *

6. The *Revised Plaintiffs' Plan* and its variants plainly demonstrate that it is possible to use reasonable redistricting principles and create a plan that does not maximize downstate or upstate influence, keeps more counties intact, and keeps the borough of Queens intact while still creating an additional two minority-majority districts.

* * *

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	* * *

ANDREW A. BEVERIDGE, under penalty of perjury, makes the following declaration

1) I, Andrew A. Beveridge, am Professor of Sociology at Queens College and the Graduate Center, City University of New York. My primary responsibilities at the college and Graduate Center are teaching statistics and research methods at the graduate and undergraduate level and conducting quantitative statistically based social research. Trained at Yale University, I have been employed in such a capacity since 1973, first at Columbia University until 1981 and since then at Queens College and the Graduate Center of CUNY. My areas of expertise include demography the statistical and quantitative analysis of social science data sets, most particularly including Census data, survey data and administrative records. I am an expert in the application of GIS technology to the analysis of social patterns. I have analyzed the impact of neighborhood characteristics on educational outcomes and substance use. I have published results from my research, which are noted on my résumé. (Attached as Ex. A.) Some of these results have been widely disseminated by serving as the basis of articles in the New York Times, where I serve as a demographic consultant through an agreement between the CUNY Research Foundation and the Times. I am also responsible for analyzing New York State education data for the New York Times. In addition, I publish a regular column on demographic topics in the Gotham Gazette, an on-line publication of Citizens Union. I have served as a consultant to a number of public and private entities, where I provide services related to demographic analysis, including districting and redistricting. For instance, I am under contract to the Yonkers City Council to assist Yonkers in redistricting and the development of new election districts.

2) I have been admitted as an expert in demographic and statistical analysis and have testified in the following cases, among others: Montano v. Suffolk County

(Declaration and Testimony at Trial, 2003); New Rochelle Voters Rights Defense Fund v. City of New Rochelle (Declaration and Testimony at Trial, 2003); People v. Sweat (Affidavits, 2003); People v. Taylor (Affidavit and Testified at Trial 2002); Walton v. City of Long Beach. (Testified at trial, 2000.); Village of Spring Valley v. Town of Clarkstown, (Testified at trial, 2000.); United States v. Rudolph Weaver, (Affidavit and testified at trial, 2000, Cited in 3rd Circuit Opinion); New York City Environmental Justice Alliance, et al. v., Rudolph W. Giuliani, et al. (Affidavit, 1999, Cited in the 2nd Circuit opinion.); Open Housing Center, Inc. v. Kings Highway Realty, a Division of Provenz Realty Corp.; Provenz Realty Corp; Diane Provenz; Evelyn Cannon; and Barbara Noonan (Affidavit. Cited in judge=s opinion, 1996.); New York State v. Gordon (Affidavit, 1997.); New York State v. Hale, 1996-1997 (Affidavit, 1996-1997); New York State v. Chin, (Affidavit, 1997); United States v. Jose Reyes, et al., (Report and Testimony, 1996, Cited in District Court Opinion); Goosby v. Town Board of Hempstead (Report and Testimony, 1995-96, Cited in District Court and 2nd Circuit Opinion); Lachica v. Emergency Medical Services, (Report, 1996.); Coalition for Fair Representation, et al. v. City of Bridgeport, et al. (Affidavit, 1994, Cited in 2nd Circuit Decision.); and Garrison v. I.R.S., 1991-1992. (Report and Testimony, 1992). Virtually all cases and testimony are catalogued in my résumé attached as Ex. A.

3) I was retained by the attorneys for plaintiffs to analyze the disparate impacts by geographic location and African American and Hispanic status of the plan adopted New York State to redistrict the New York State Senate in the 20002 and later elections. I was also to assess the plan with respect to the dilution of minority voting strength. I also was asked to look at various aspects of the differential status of African Americans and Hispanics in New York State with respect to a range of social factors, including education and economic status. I am being paid $175 for all work in court on this case, and $125 for all other work.

4) To carry out this analysis I had access to various documents pertaining to development of the Senate Plan, as well as materials depicting several alternative plans. These included the following:

1) The Senate Plan as a catalog of Census Blocks and Senate Districts;

2) Data from the United States Bureau of the Census, which provided information on the racial composition and ethnic status of the total and voting age population for each Census Block in New York State in 2002, and data from earlier Censuses;

3) Similar information for plans proposed by the plaintiffs;

4) Similar information for the plan adopted for the 1992 and later elections;

5) Materials related to the adoption of the plan; and

6) Computations and boundary files related to plans adopted for elections in the 1970s, 1980s.

7) Information related to the 1992 Assembly Redistricting Plan, New York City and Yonkers City Council Districts, Suffolk, Westchester and Nassau County Legislative Districts, and the Hempstead Town Council.

8) Data and other documents from the New York State Department of Education presenting test score results across New York State.

9) The "Section 5" filing related to the plan.

10) An analysis of Communities of Interests prepared for the plan.

11) Maps indicating the racial and ethnic composition of Nassau and Suffolk County during several decades and their relation to districts in those counties.

12) Materials related to the case Goosby v. Town Board of Hempstead.

13) Materials related to the case Diaz v. Yonkers.

14) The racial bloc voting analysis carried out under the direction of Professor Vernon Burton.

15) The report drafted by Professor Gerald Benjamin.

16) To carry out my analyses I used a Geographical Information System (Maptitude), as well as a variety of statistical and other software, including SPSS (versions 10 and 11) SAS version 8.2 and Microsoft EXCEL.

5) From my analyses of the adopted Senate plan and of the alternative plans the following conclusions are inescapable:

1) *The Senate Plan overpopulates every upstate district and underpopulates every downstate district. Thus downstate, the home of about four-fifths of all of the Hispanics and African Americans in New York State is deprived of on one seat.*

* * *

4. *The Revised Plaintiffs' Plan, which does not have the systematic population disparities, provides for an additional district in the Southern Westchester Northern Bronx area, dissolves the minority "packing" and "cracking" in that area, and reunites the minority communities in Nassau and Suffolk counties.*

* * *

6. *The Revised Plaintiffs' Plan and its variants plainly demonstrate that it is possible to use reasonable redistricting principles and create a plan that does not maximize downstate or upstate influence, keeps more counties intact, and keeps the borough of Queens intact*

while still creating an additional two minority-majority districts.

A. MASSIVE POPULATION CHANGES IN NEW YORK STATE REQUIRED THAT THE SENATE DISTRICTING PLAN SHIFT ONE SEAT FROM UPSTATE TO DOWNSTATE.

5) Over two years ago, on March 14, 2001, the Census Bureau transmitted to New York State the redistricting population counts from the 2000 Census. According to the Census data, New York State's 2000 population stood at 18,976,457. This represented a gain of almost one million or a gain of 5.48 percent from 19905).

6) The pattern of growth is stark indeed. New York City gained 685,714 and thus accounted for over two-thirds of the growth. The rest of it was concentrated in the areas relatively near New York: Nassau, 47,196 or 3.67 % growth; Suffolk 97,505 or 7.38% growth; Westchester, 48,953 or 5.55% growth; and Rockland 21,278 or 8.02% growth. Indeed, together New York City and these five counties account for over 91 percent of all of New York State's population growth. (Additional information on population changes from 1960 through 2000 are presented in Tables 1 to 3)

~~7)~~ Indeed, in the area west of the Albany corridor population fell between 1990 and 2000.

8) When the 1992 Senate Plan, which included 61 seats is analyzed using the population from 2000, the following results are found:

9) Two of the nine districts in Long Island would be overpopulated (Districts 1 (by 22,189) and District 3 (by 4,102) the rest would be underpopulated. Together the Long Island Districts would be underpopulated by 45,888.

10) In the general downstate area (Districts 10 through 38), seven districts would be underpopulated, but 22 districts would be overpopulated. Together all 29 districts

would be overpopulated some 367, 494. Based upon an ideal value of 311,089 this represents a gain of 1.18 seats for downstate.

11) In the general upstate area (Districts 39 to 61), three of the 23 districts gain population. Two of those are the districts nearest New York City. The other 20 districts all lose population. Together all 23 districts lose 321,578. Based upon the ideal value, this would translate into a loss of 1.03 Senate seats in the upstate region.

12) Based upon a "benchmark" plan using the 1992 Senate plan and 2000 population, Upstate should lose about one seat; Downstate should gain one seat, and something should be done to absorb the overall underpopulation in Long Island. This would require drawing lines taking into account the population changes recorded in Census 2000.

13) This sort of demographic shift with New York City and the rest of downstate making major gains at the expense of upstate had not occurred at least since 1960. Rather the pattern had been of increasing population share upstate and in the suburbs. (See Tables 1 through 3 for further details.)

14) The adopted plan increased the number of seats in the Senate to 62. Accordingly, in a 62-seat Senate redistricting plan the ideal population per district is 306,072.

15) For purposes of considering population equality, the Senate Plan naturally falls into three sections:

1. Long Island: Nine districts with an average size of 305,990 a mere 82 fewer than the ideal size (the average size of all 62 districts) 306,072. (Districts 1 to 9.)

2. Downstate. Twenty-nine districts, including all of the five boroughs, southern Westchester, Rockland county and on into two towns in Orange County. Average district size

313,334 or 7,262 larger than the ideal (Districts 10 to 38.)

3. Upstate. Twenty-four districts West and North of Downstate. Here the districts average 297,328 or 8,744 smaller than the ideal. Comparing Upstate with Downstate, one finds that the average Downstate district has 16,006 more population than the average Upstate district or roughly 5.4 percent more. (Districts 39 to 62.) The pattern is stark. It is apparent from Table 10 and Maps 06a and 06b. Detailed information about the plan is presented in Tables 10 and 11, Maps 01a through 01e, and Appendix 5a.

16) It should be noted that Long Island is a well defined. The Downstate districts include almost all the New York portion of the newly created New York Division of the New York-New Jersey Metropolitan Area, except for Northern Westchester and Putnam County, and two towns in Orange County. Upstate is the balance of New York State, and is nearly identical with 53 counties, all of New York State except, New York City, Long Island and Westchester and Rockland County. Although the precise boundaries of "Upstate" and "Downstate" can be debated, the districts in the plan plainly divide into Upstate and Downstate. In fact, exactly how the boundary is delineated makes little

difference in terms of reporting demographic or other trends.[1]

17) As shown in Tables 4 and 5 (and spelled out in more detail in Tables 6 through 9) apportionments among the three regions was much more equal in the redistricting rounds following the release of the 1970, 1980 and 1990 Censuses. It was only after the 2000 Census that the Senate redistricting plan seriously malapportioned the downstate region.

18) The pattern in the Senate Plan is the result of conscious design. If one takes into account simply that all 29 Downstate districts are over populated, there is virtually no way the pattern could have occurred by chance.

19) When the 62 districts are treated as if they were results of a random process, then one can estimate the

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[1] The number of districts apportioned to a region comprising New York City and Westchester County would be 28 whole districts, plus 54.69% of District 40, for a total of 28.55 districts. This six-county region has enough population (8,931,737) for 29.18 districts of the ideal population, and so is shorted 0.63 of a district, to the benefit of the 54 counties north and west of this region. Include Rockland County, and 89.37% of District 38 must be added, for a total of 29.44 districts. This seven-county region has enough population (9,218,490) for 30.12 districts of the ideal population, and so is shorted 0.68 of a district, to the benefit of the 53 counties north and west of this region. Add Putnam County _ to include the entire New York, NY PMSA and 86.25% of District 40 must be included, for a total of 29.76 districts. This eight-county region has enough population (9,314,235) for 30.43 districts of ideal population, and so is shorted 0.67 of a district, to the benefit of the 52 counties north and west of this region. If New York City, Long Island, and Westchester were defined as the downstate region, then the region has a total of 37.55 districts (37 whole districts, plus 55% of District 40). This eight-county region has enough population (11,685,650) for 38.18 districts of the ideal population, and so is shorted 0.63 of a district, to the benefit of the 54 counties to the north and west. If downstate were redefined to include Districts 1-38 (adding Long Island), then the region would have enough population (11,840,590) for 38.69 districts, rounded down by Plan to 38; and the upstate region (39-62) would have enough population (7,135,867) for 23.31 districts, rounded up to 24.

likelihood that all the Upstate districts are over populated could have occurred by chance.

20) To model such processes the binomial distribution is used. This distribution is used to compute the chance that a given event occurs at least a set number of times during a set number of trials, here populating districts.

21) The formula is reproduced and the binomial distribution is described in virtually any introductory statistics text. (See for example, Introduction to the Practice of Statistics (3rd Edition), David S. Moore and George P. McCabe. New York: William H. Freeman, 1999. Pp. 375-390.)

22) The formula takes into account, the number of trials, the probability of success on each trial, and the number of ways such success can be achieved. Common software, including formulas available in most spread-sheet programs, is available to compute the probability of various events based upon the binomial distribution.

23) I employed such software (Microsoft Excel) to carry out my calculations.

24) If the over population in each district were an independent and random event, the pattern discerned would have occurred once in 409,894,288,378,213,000, or one time in 409 quadrillion, 894 trillion, 288 billion, 378 million, 213 thousand times.

25) Thus, it is plain that the Senate Plan is a discriminatory scheme to deprive Downstate of the appropriate level of representation given the size of its population. It gives the benefit of an extra 210,589 people to Upstate, roughly two-thirds of a Senate District, and it deprives those living Downstate by an equal amount.

26) In effect, the Senate redistricting plan faced a relative population shift upstate to downstate in excess of 500,000 people. To solve this problem, it created one new downstate district in New York City, which absorbed about

300,000 of the excess population. The remaining approximately 210,000 people were distributed throughout the downstate districts, thus diluting their strength at the expense of the upstate districts.

27) It is as if the Senate created a 61-seat plan for the entire state of New York, which had shifted on seat downstate. Then in the last minute they allocated an extra set upstate. This had the effect of leaving all of downstate overpopulated and leaving all of upstate underpopulated. See Appendix 1 for more details.

B. THE SENATE PLAN'S DISCRIMINATORY IMPACT DILUTES THE MINORITY POPULATION IN NEW YORK STATE

28) The Senate Plan dilutes minority population. Of the 13 Districts in the Senate Plan, which are claimed as minority districts, (as well as, the 14 districts that have more than 50 percent minority population) all are over populated. The average over population of the minority districts is 6,735. So each and every of one of these districts is diluted. The total dilution is 94,292 people.

29) The likelihood that the 14 African American and Latino Districts (as defined by the Senate Plan) all would be over populated, if the process that created them was random, is one time in 77,558,760. In short, the process by which the districts were populated with respect to African-Americans and Latino Districts is not random. Rather it is part of some larger scheme.

30) Furthermore, roughly 81 percent of the Latino population, 74 percent of the African-American population, and 78 percent of the combined Latino/African-American population live "Downstate," while that area encompasses only 47.9 percent of the total population. So the over population "Downstate" affects Latinos and African Americans more than proportionately.

C. THE DEVIATION FROM IDEAL AND THE GEOGRAPHIC DISPARITIES GO WELL BEYOND THE PLANS IN PLACE FROM THE 1970s, 1980s AND 1990s

31) Tables 6 to 10 contain Senate district populations and deviations for 1972, 1982, 1984, 1992, and 2002 Senate Plans.

32) In 1972, the range ("total deviation") was 1.83% of the mean district population, the average deviation was only 0.12%, and the standard deviation was only 0.27%. In 1982 the range was 5.30%, but the average deviation was only 0.83%, and the standard deviation was only 1.09%. In 1992 the range was 4.29%, but the average deviation was only 0.90%, and the standard deviation was 1.07%.

33) In the Senate 2002 Plan, however, the range jumps to 9.78%, the average deviation is 2.22%, and the standard deviation is 2.74%. This represents a degree of population inequality quite without precedent in the New York State Senate apportionments of the last three decades. (It must be remembered, when interpreting these figures, that the mean deviation and standard deviation measure deviation from the *mean*, and are necessarily much smaller numbers than the range, which is difference between the largest and the smallest).

34) In 1972, 30 districts (Senate Districts 9 through 38) -- comprising New York City, part of Nassau County (in part of District 9), and most of Westchester and Rockland Counties B had 50.0% of the state population. The 30 districts also constituted exactly 50% of the 60 districts in the 1972 plan. Districts 9 through 38 had a mean population of 304,001. The Upstate districts (39 through 60) had a mean population of 304,030. The difference between the mean populations for the two regions was 29 persons.

35) In 1982, 28 districts (Senate Districts 10 through 36 and 38) -- comprising New York City, part of Nassau County

(in part of District 11), most of Westchester County, Rockland County, and three towns in Orange County – had 45.8% of the state population. The 28 districts constituted 45.9% of the 61-seat Senate. The mean population of Districts 10 through 36 and 38 was 287,016. The mean population of the Upstate districts (37 and 39 through 61) was 289,068. The difference between the mean populations for the two regions was 2,052 (with the advantage, such as it was, in favor of the Downstate districts).

36) In 1992, 28 districts (Senate Districts 10 through 36 and 38) – comprising New York City, most of Westchester County, Rockland County, and three towns in Orange County – had 46.3% of the state population. The 28 districts constituted 45.9% of the 61-seat Senate. Based on a mean district population of 294,925, the 28 districts had enough population for 28.23 districts, which was rounded down to 28 according to the ordinary rules of arithmetic. The mean population of Districts 10 through 36 and 38 was 297,367. The mean population of the Upstate districts (37 and 39 through 61) was 293,957. The difference between the mean populations for the two regions was 3,410. (There was a larger discrepancy between the New York City-Westchester-Rockland districts and the Long Island districts. Districts 1 through 9 – Nassau and Suffolk – had a mean population of 289,912.)

37) In 2002, the Senate Plan creates 29 districts (Senate Districts 10 through 38) – comprising New York City, most of Westchester County, Rockland County, and two towns in Orange County – that would have 47.9% of the state population, but would constitute only 46.8% of a 62-seat Senate. Based on a mean district population of 306,072, the 29 districts have enough population for 29.69 districts, which the Senate Plan rounded *down* to 29. The mean population of Districts 10 through 38 is 313,334.

38) In 2002, the Senate Plan creates 24 districts (Senate Districts 39-62) comprising the upstate Region (except for

two towns in Orange County) and a small part of Westchester County. Based on a mean district population of 306,072, the 24 districts would have enough population for 23.31 districts. The mean population of the Upstate districts (39 through 62) is 297,328. This has been discussed above.

D. POPULATION TRENDS AND PRISON POPULATION MEAN THAT THE REAL POPULATION DEVIATION IS IN EXCESS OF 10 PERCENT

39) A recent report shows that the prison population moves many New York City residents to upstate to live in confinement as "unwilling sojourners.") (See *Importing Constituents: Prisoners and Political Clout in New York*: A Prison Policy Initiative Report by Peter Wagner. Available at the following URL http://www.prisonpolicy.org/importing/importing.shtml)

40) Based upon figures from State corrections authorities, the report places the net number of prisoners transferred from Downstate to Upstate as 43,700. These prisoners add population, who are not resident and should not be counted to several of the most underpopulated Upstate districts. Therefore these districts would be even more underpopulated were the prisoners not counted, and they should not be counted.

41) They include 47, 48, 49, 51 and 54. At the same time, an average of 1,800 individuals should be added to each of the New York City Senate districts, so that New York City residents will be counted where they reside.

42) The effect that adding the prison population has on the deviations from ideal for some districts is shown in Table 13. The overall deviation attributing prisoners to the appropriate districts is 11.19 percent.

43) Not only did the *2002 Senate Plan*, in effect, reverse the population trends shown by the 2000 Census, it

did nothing to accommodate the continuing shift of population in New York State.

44) On April 17, 2003 the Census released population estimates for all the counties in the United States as of July 1, 2002. Using those data, I estimated the population and deviation as of July 1, 2002 in each of the 2002 Senate plan districts. These results are shown in Table 14. As can be seen, the deviations have grown. The most overpopulated district is district 38, which has an estimated deviation of 5.98 percent. Upstate the underpopulation pattern continues to be heightened with six districts now having deviations beyond -5.0 percent, (districts 47 through 52.) Indeed, district 48 has an estimated deviation of -6.95 percent. The total deviation is thus 13.93 percent.

45) Because the underpopulation in the Senate plan is concentrated in areas that are declining in population (at least relative to the rest of New York State) it not only overturned the results of Census 2000, but it was plainly foreseeable that as the population shifts continued the pattern would worsen.

46) The Senate Plan considering foreseeable population shifts and the prison population is plainly well beyond a total deviation of 10 percent. Furthermore, the total deviation will continue to increase throughout the decade, as the relative population decline in Western New York continues. Indeed, much of Upstate has been losing population for at least a decade. It is only in areas around Albany, including Saratoga and other parts of the corridor connecting Downstate to Albany, and in some of the Upstate suburbs where growth continues to occur.

47) Despite these obvious population trends, and known problems regarding the location of prisoners in terms of residence, the Senate plan still overpopulates areas of population growth where many upstate prisoners actually reside.

* * *

H. PLAINTIFFS' PLAN TAKES INTO ACCOUNT POPULATION CHANGE, LEAVES MORE PLACES INTACT, IS MORE COMPACT, AND DOES NOT DILUTE MINORITY POPULATION.

70) Plaintiffs propose a plan (see Tables 14 and 15, Maps 2a through 2e and Appendix 5b) that is much more faithful to principle of population equality. The *Revised Plaintiffs' Plan* does not attempt to turn back the clock by undermining the results of the 2000 Census. Rather it assumes that the current population trends will continue into the next decade. Therefore, instead to denying a seat to Downstate and leaving that area with an over population of 210,589 to spread among 29 seats, it moves one seat to Downstate and slightly under populates based upon the 2000 Census numbers. (A detailed discussion of the *Revised Plaintiffs' Plan* is presented in Appendix 3.)

71) The population trends all favor Downstate over Upstate. So the under population in the *Revised Plaintiffs' Plan* is more apparent than real. While under population in the Senate Plan is in an area where the official population is over stated, and where population is either declining or only growing in selected areas. Furthermore, as seen below, the *Revised Plaintiffs' Plan* in no way is a plan that maximizes the influence of the Downstate region or of minority communities.

72) The *Revised Plaintiffs' Plan* also splits fewer jurisdictions and has a smaller overall and average deviation. In fact, the population trends mean that the actual deviations in the Senate Plan are higher than those computed just using Census data, while the actual deviation in the *Revised Plaintiffs' Plan* are smaller.

73) The *Revised Plaintiffs' Plan* is more compact on average than the Senate Plan. Table19 summarizes the detailed results presented in Tables 12 and Table 17 and

Appendix 3 provides the definitions for seven measures of compactness For every single one of these measures, the *Revised Plaintiffs' Plan* is more compact overall than is the *2002 Senate Plan.* For instance, one of the most common measure of compactness, the Roeck or dispersion test, which compares the area of the district to an area of, enclosed circle, the mean of the Senate Plan is .35, that of the Plaintiffs= plan is .40. A score of 1.0 would be completely compact, so on average by this measure the Plaintiffs= plan results in a more compact districting. The same is true for all seven measures displayed in Tables

I. THE PLAINTIFFS' PLAN CREATES ADDITIONAL MINORITY DISTRICTS

74) As reported in the Tables 11 and 16 and reiterated in Table 18, the *Revised Plaintiffs' Plan* allows the drawing of one more combined Latino African American district to be drawn in an area that includes some of Yonkers and the Northern Bronx. This is an area where African Americans and Latinos are settled together and are politically cohesive. Because of the shift one district from Upstate to Downstate it is possible to create this district, which is number 36. At the same time, the *Revised Plaintiffs' Plan* dissolves the "doughnut" district. All of these changes are depicted in Map 18 and Table 16.

75) The revised plaintiffs' plan reunites the minority communities in Nassau and Suffolk Counties by creating two compact districts. For District 8 in the plaintiffs' plan the minority percentage is 54.3 percent. This percentage gives an ample opportunity for minorities to elect a candidate of their choice. For District 4 in the Revised Plaintiffs' plan the minority percentage is 40.2 percent. This gives that community a chance to elect a candidate of their choice with adequate crossover votes. Both districts help to reunite the fractured minority communities in Long Island and reverse 30 years of racial gerrymandering. Map 15 and Table 16 presents information on these proposed districts.

J. VARIANTS OF THE PLAINTIFFS' REVISED PLAN DEMONSTRATE THAT THE HIGH DEVIATION FOUND IN THE 2002 SENATE PLAN WAS NOT NECESSARY TO KEEP UPSTATE COUNTIES OR QUEENS COUNTY INTACT

76) The plaintiffs created a variant of their plan to illustrate that if population deviations were used to keep counties intact, a plan with a total deviation approaching 10% would divide a much smaller number of counties – especially 'minor' counties – than the *2002 Senate Plan*.

77) This *High Deviation Variant* is identical to the *Revised Plaintiffs' Plan* for proposed Districts 1-39 (Long Island and Downstate), but differs significantly Upstate. It divides only four 'minor' counties, compared with 11 in the *2002 Senate Plan*, but has lower deviation measures (a total deviation of 9.56%), and achieves a higher degree of compactness, by every measure. It also apportions to each region of the state the number districts most nearly equal to the region's share of the state population, and gives minority group voters more opportunities to elect the senators of their choice. The *High Deviation Variant* is illustrated in Maps 3 and 8. See Tables 20 and 21 for details about population composition of the districts of this plan. See Table 22 for a comparison of this plan with the *2002 Senate plan*. Plan components are displayed in Appendix 5c.

78) Plainly, the high and disproportionate deviation found in the Senate Plan was not required merely to prevent minor counties from being divided among districts. Rather, as noted, it was part of scheme to deprive the downstate area of proportional representation.

79) The plaintiffs created still another plan to demonstrate the high level of deviation and malapportionment between the Upstate and Downstate regions found in the Senate Plan was not necessary to keep Queens County in tact. This *Composite Plan* takes the Queens

County districts from the *2002 Senate Plan*, without any change. The Long Island districts (1-9), the Rockland-Orange district (39), and the 19 districts furthest Upstate (43-45 and 47-62) are precisely as in the *Revised Plaintiffs' Plan*. The districts in New York City and southern Westchester (17-38), and the four upstate districts just to the north (40-42 and 46) are based on the *Revised Plaintiffs' Plan*, but have been redrawn so as to create no district extending into Queens County, while preserving strict compliance with the town-on-border and block-on-border rules. Maps 04a, 04b, 04c, 09a and 09b illustrate this plan and its deviations. Tables 22, 23 and 24 present data about this plan. The plan components are in Appendix 5d.

80) As in the *Revised Plaintiffs' Plan*, the regions of apportionment are almost identical to the *2002 Senate Plan*. The *Composite Plan* (like the *Revised Plaintiffs' Plan*) attaches different Orange County towns to Rockland County (reducing the overpopulation of the Rockland-Orange district). Te *Composite Plan* (to comply with the town-on-border rule) includes one additional town in the district that extends southward into Yonkers.

81) Like the *Revised Plaintiffs' Plan*, and unlike the *2002 Senate Plan*, the *Composite Plan* apportions to the Upstate and Downstate regions the number of districts most nearly proportional to each region's share of the state population. In the *Composite Plan*, the Downstate region, comprising the 30 contiguous districts 10-39, has enough population (9,082,583) for 29.67 districts of the ideal population (306,072). The Upstate region, comprising the 23 contiguous districts 40-62, has enough population (7,139,961) for 23.33 districts of the ideal population.

82) Both the most and least populous districts are in the Downstate region. The Queens districts all have deviations of +4.05 to +4.06%. The districts in the balance of New York City and in southern Westchester all have deviations of -2.86%. The total deviation is 6.91% (compared

with 4.87% in the Revised Plaintiffs' Plan and 9.78% in the 2002 Senate Plan).

83) The Composite Plan divides 20 counties (other than to create multiple districts wholly within a county). Like the *Revised Plaintiffs' Plan*, this plan divides only 9 minor counties (compared with 11 in the *2002 Senate Plan*). Like the *2002 Senate Plan*, it divides 11 major counties (all except Queens). Unlike the *2002 Senate Plan* (and also unlike the *Revised Plaintiffs' Plan*), however, it creates a district wholly within Orange County. It also achieves a higher degree of compactness than the *2002 Senate Plan*, by every measure, even though it incorporates the highly non-compact Queens County districts of the *2002 Senate Plan*.

84) Obviously, the systematic malapportionment in the *2002 Senate Plan* was not the result of the effort to keep Queens County in tact, rather it was the result of the scheme to deprive the Downstate area of a fair share of the State Senate.

K. PLAINTIFFS CREATED A PLAN THAT CREATES MINORITY DISTRICTS AND APPORTIONS POPULATION IN A MANNER OPPOSITE TO THAT DONE BY THE 2002 SENATE PLAN

85) The *Reverse Malapportionment – Minority District Maximization Plan* (or "Reverse/Maximization Plan") demonstrates that the Defendants mischaracterize the Revised Plaintiffs' Plan. It shows what a Senate plan would look like that:

1) malapportions districts in "precisely the same pattern [as the 2002 Plan], only in reverse" [*Def. Brief* at 10] and contains "nearly identical [population] differences (only in reverse)" [*Def. Brief* at 11-12];

2) attempts "maximization of the number of majority-minority districts statewide" [*Def. Brief* at 39]; and

3) "segregates as many minority voters as possible into a single Suffolk County district" [*Def. Brief* at 25].

86) The regions of apportionment in the *Reverse/Maximization Plan* are not quite identical to those in the *2002 Senate Plan* (or the *Revised Plaintiffs' Plan*). In order to create "nearly identical differences (only in reverse)," while complying with the block-on-border and town-on-border rules, the *Reverse/Maximization Plan* creates 31 whole districts (Districts 10-40) in a region comprising all of New York City and Westchester and Rockland Counties, plus three towns in Orange County (with 7.4% of the county population). This contiguous 31-district region contains sufficient population (9,243,768) for 30.20 districts of the ideal population (306,072). This is rounded up to 31, contrary to the usual rules of arithmetic. The entire region to the north, comprising Districts 41-62, contains sufficient population (6,978,776) for 22.80 districts of the ideal population. This is rounded down to 22. (Maps 05a, 05b, 10a, and 10b document aspects of this plan. Table 25 gives a population summary of the plan, including deviations by district and racial and Hispanic composition by district.)

87) The *Revised Plaintiffs' Plan*, which gives to each region the number of whole districts most nearly proportional to its share of the total state population, would entail the loss of one upstate Senate district, reflecting the population shifts revealed in the 2000 Census. The *2002 Senate Plan*, which apportions districts so as to repeal the census, entailed the loss of no upstate district. The *Reverse/Maximization Plan*, the mirror image of the *2002 Senate Plan* eliminates two upstate districts – one more than the population shift would require.

88) The *Reverse/Maximization Plan* has a total deviation of 8.97%, compared with 9.78% in the *2002 Senate Plan*; it divides 20 counties in total, and only eight minor counties (as compared with 22 in total, and 11 minor counties, the *2002*

Senate Plan); it divides only the two largest Upstate cities (Buffalo and Rochester); it complies strictly with the block-on-border and town-on-border rules throughout the state; and the Upstate districts are relatively compact (the plan as a whole has low compactness measures because of the highly non-compact districts in its Downstate and Long Island regions, as discussed below). But the Reverse/Maximization Plan, unlike the Revised Plaintiffs' Plan, apportions to upstate residents less than their proportional share of Senate districts.

89) The *Reverse/Maximization Plan* includes nine districts with a black voting-age majority (Districts 10, 12, 18, 19, 20, 21, 22, 30, and 35), eight with an Hispanic voting-age majority (Districts 16, 17, 24, 31, 32, 33, 34, and 36), two additional districts with a combined black and Hispanic voting-age majority (Districts 4 and 8), and one additional district in which minority group voters can elect the representative of their choice (District 61). *The Revised Plaintiffs' Plan*, in contrast, includes only eight districts with a black voting-age majority (Districts 10, 12, 18, 19, 20, 21, 30, and 35), only seven districts with an Hispanic voting-age majority (Districts 16, 17, 31, 32, 33, 34, and 36), one additional district with a combined black and Hispanic voting-age majority (District 8), and two additional districts in which minority group voters can elect the representative of their choice (Districts 4 and 61). The *Revised Plaintiffs' Plan* thus clearly does not maximize the number of majority-minority districts, since the Reverse/Maximization Plan shows that it is possible to create yet one more majority-black district and one more majority-Hispanic district.

90) To draw these additional majority minority districts required adherence to several principles that contradict standard or reasonable "redistricting principles:" a) the *Reverse/Maximization Plan* reverses the malapportionment of the 2002 plan, giving the Downstate region one more district than the number of whole districts most nearly proportional to its population share, b) many of

the districts are highly non-compact, c) some of the districts are racially gerrymandered, and d) the plan makes no attempt to preserve communities defined by actual shared interests.

91) The *Reverse/Maximization Plan* does "segregate as many minority voters as possible into a single Suffolk County district." District 4 of this plan has a combined black and Hispanic voting-age population of 50.09%, compared with 40.19% for District 4 of the *Revised Plaintiffs' Plan*. District 4 of the Reverse/Maximization Plan is a racial gerrymander, and its irregular shape comes from abandoning the principles that underlie the *Revised Plaintiffs' Plan*: contiguity, compactness, respect for existing political subdivisions, respect for traditionally recognized unincorporated hamlets (Census Designated Places), and preservation of communities united by actual shared interests. It demonstrates that the Defendants falsely characterize District 4 of the *Revised Plaintiffs' Plan*. Obviously, a similar illustrative exercise could be undertaken with respect to District 8 of the Revised Plaintiffs' Plan.

92) The *Revised Plaintiffs' Plan* shows what additional representation minority group voters would enjoy, without the employment of any maximization principle, in a plan of compact districts, which preserves political subdivisions and communities of actual shared interests – and avoids such discriminatory practices as malapportionment, racial gerrymandering, or the fracturing of some minority populations and the packing of others.

* * *

122) The foregoing is based upon the materials noted and relies upon my qualifications as a demographer and social scientist.

Table 1. County Populations 1960-2000

	1960	1970	1980	1990	2000	County	1960	1970	1980	1990	2000
New York State	16,782,304	18,242,584	17,558,165	17,990,455	18,976,457	New York	1,698,281	1,539,233	1,428,285	1,487,536	1,537,195
County						Niagara	242,269	235,720	227,354	220,756	219,846
Albany	272,926	286,742	285,909	292,594	294,565	Oneida	264,401	273,037	253,466	250,836	235,469
Allegany	43,978	46,458	51,742	50,470	49,927	Onondaga	423,028	472,835	463,920	468,973	458,336
Bronx	1,424,815	1,471,701	1,168,972	1,203,789	1,332,650	Ontario	68,070	78,849	88,909	95,101	100,224
Broome	212,661	221,815	213,648	212,160	200,536	Orange	183,734	221,657	259,603	307,647	341,367
Cattaraugus	80,187	81,666	85,697	84,234	83,955	Orleans	34,159	37,305	38,496	41,846	44,171
Cayuga	73,942	77,439	79,894	82,313	81,963	Oswego	86,118	100,897	113,901	121,771	122,377
Chautauqua	145,377	147,305	146,925	141,895	139,750	Otsego	51,942	56,181	59,075	60,517	61,676
Chemung	98,706	101,537	99,656	93,195	91,070	Putnam	31,722	56,696	77,193	83,941	95,745
Chenango	43,343	46,368	49,344	51,768	51,401	Queens	1,809,578	1,987,174	1,891,325	1,951,598	2,229,379
Clinton	72,722	72,934	80,750	85,969	79,894	Rensselaer	142,585	152,510	151,966	154,429	152,538
Columbia	47,322	51,519	59,487	62,982	63,094	Richmond	221,991	295,443	352,029	378,977	443,728
Cortland	41,113	45,894	48,820	48,963	48,599	Rockland	136,803	229,903	259,530	265,475	286,753
Delaware	43,540	44,718	46,824	47,225	48,055	St. Lawrence	111,239	112,309	116,347	111,974	111,931
Dutchess	176,008	222,295	245,055	259,462	280,150	Saratoga	89,096	121,764	153,759	181,276	200,635
Erie	1,064,688	1,113,491	1,015,472	968,532	950,265	Schenectady	152,896	161,078	149,946	149,285	146,555
Essex	35,300	34,631	36,176	37,152	38,851	Schoharie	22,616	24,750	29,710	31,859	31,582
Franklin	44,742	43,931	44,939	46,540	51,134	Schuyler	13,044	16,737	17,686	18,662	19,224
Fulton	51,304	52,627	55,153	54,191	55,073	Seneca	31,984	35,083	33,733	33,683	33,342
Genesee	53,994	58,722	59,600	60,060	60,370	Steuben	97,691	99,546	99,217	99,088	98,726
Greene	31,372	33,136	40,861	44,739	48,195	Suffolk	666,784	1,127,030	1,284,231	1,321,864	1,419,369
Hamilton	4,367	4,714	5,034	5,279	5,379	Sullivan	45,272	52,580	65,155	69,277	73,966
Herkimer	66,370	67,633	66,714	65,797	64,427	Tioga	37,802	46,513	49,812	52,337	51,784
Jefferson	87,835	88,508	88,151	110,943	111,738	Tompkins	66,164	77,064	87,085	94,097	96,501
Kings	2,627,319	2,602,012	2,231,028	2,300,664	2,465,326	Ulster	118,804	141,241	158,158	165,304	177,749
Lewis	23,249	23,644	25,035	26,796	26,944	Warren	44,002	49,402	54,854	59,209	63,303
Livingston	44,053	55,041	57,006	62,372	64,328	Washington	48,476	52,725	54,795	59,330	61,042
Madison	54,635	62,864	65,150	69,120	69,441	Wayne	67,989	79,604	84,581	89,123	93,765
Monroe	586,387	711,917	702,238	713,968	735,343	Westchester	808,891	894,406	866,599	874,866	923,459
Montgomery	57,240	55,883	53,439	51,981	49,708	Wyoming	34,793	37,688	39,895	42,507	43,424
Nassau	1,300,171	1,428,838	1,321,582	1,287,348	1,334,544	Yates	18,614	19,831	21,459	22,810	24,621

Table 2. Regional Populations and Percentage of State Total, 1960 - 2000

	1960	1970	1980	1990	2000
New York State	16,782,304	18,242,584	17,558,165	17,990,455	18,976,457
Bronx	1,424,815	1,471,701	1,168,972	1,203,789	1,332,650
Kings	2,627,319	2,602,012	2,231,028	2,300,664	2,465,326
New York	1,698,281	1,539,233	1,428,285	1,487,536	1,537,195
Queens	1,809,578	1,987,174	1,891,325	1,951,598	2,229,379
Richmond	221,991	295,443	352,029	378,977	443,728
New York City Total	7,781,984	7,897,533	7,073,619	7,322,564	8,008,278
	46.37%	43.29%	40.29%	40.70%	42.20%
Rockland	136,803	229,903	259,530	265,475	286,753
Westchester	808,891	894,406	866,599	874,866	923,459
New York City	7,781,984	7,897,533	7,073,619	7,322,564	8,008,278
7-County Total	8,727,678	9,021,842	8,199,748	8,462,905	9,218,490
% of State	52.01%	49.45%	46.70%	47.04%	48.58%
Nassau	1,300,171	1,428,838	1,321,582	1,287,348	1,334,544
Suffolk	666,784	1,127,030	1,284,231	1,321,864	1,419,369
Long Island Total	1,966,955	2,555,868	2,605,813	2,609,212	2,753,913
% of State	11.72%	14.01%	14.84%	14.50%	14.51%
53 Upstate Counties	6,087,671	6,666,844	6,754,584	6,918,338	7,004,054
% of State	36.27%	36.55%	38.47%	38.46%	36.91%

Table 4. Apportionment 1972 to 2002

Table 4a. 1972 Apportionment

Region	Districts	Number of Districts	% of State Population	% of Senate 60 Districts	Average District Pop.
Upstate	39 - 60	22	36.70%	36.70%	304,030
Downstate	9-38	30	50.00%	50.00%	304,001
Long Island	1 to 8	8	13.30%	13.30%	304,070

Table 4b. 1982 Apportionment

Region	Districts	Number of Districts	% of State Population	% of Senate 61 Districts	Average District Pop.
Upstate	37, 39 - 61	24	39.50%	39.30%	289,068
Downstate	10 - 36, 38	28	45.80%	45.90%	287,016
Long Island	1-9	9	14.70%	14.80%	287,023

Table 4c. 1992 Apportionment

Region	Districts	Number of Districts	% of State Population	% of Senate 61 Districts	Average District Pop.
Upstate	37, 39 - 61	24	39.20%	39.30%	293,957
Downstate	10 - 36, 38	28	46.30%	45.90%	297,367
Long Island	1-9	9	14.50%	14.80%	289,912

Table 4d. 2002 Apportionment

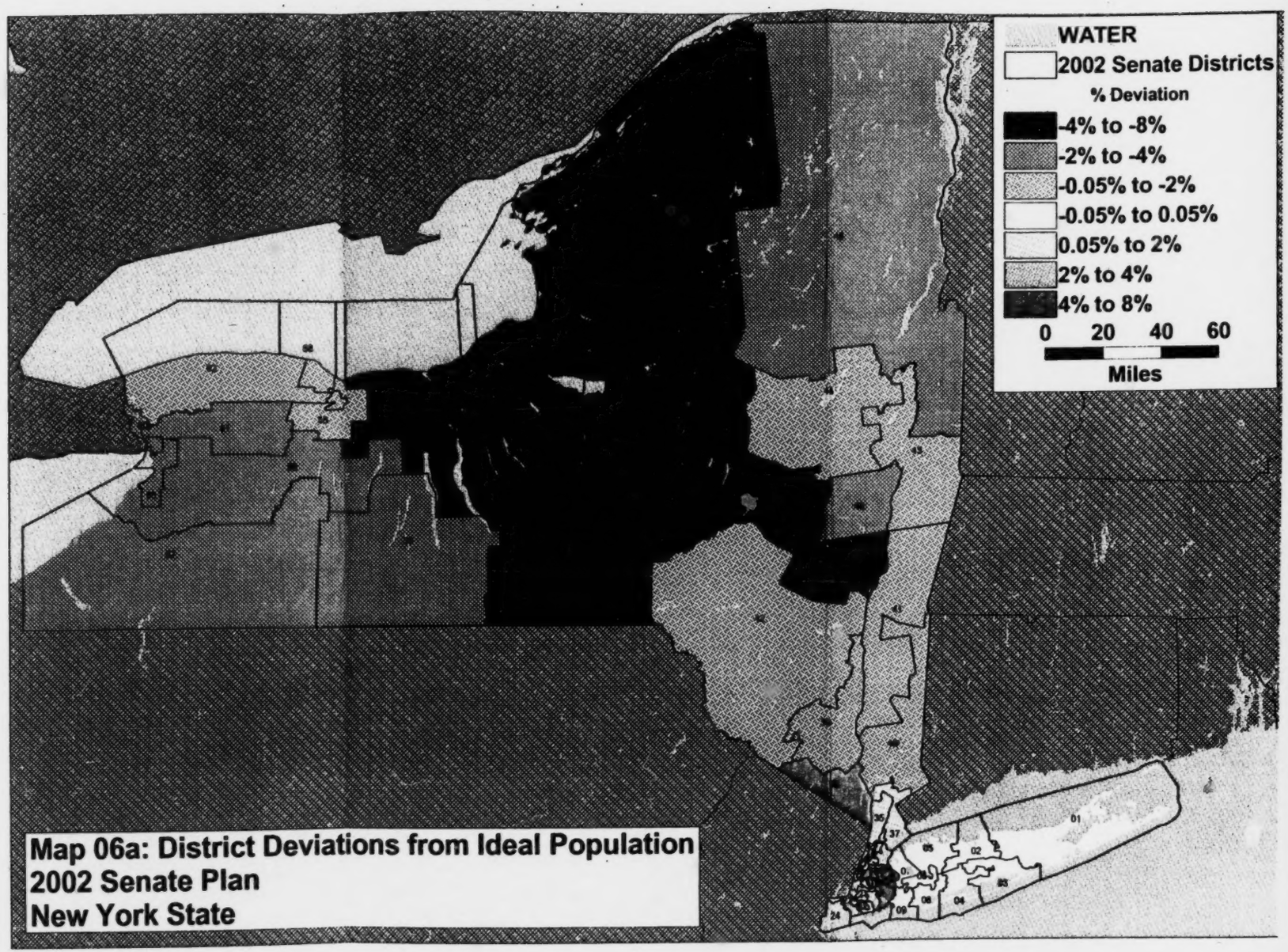
Region	Districts	Number of Districts	% of State Population	% of Senate 62 Districts	Average District Pop.
Upstate	39 - 62	24	37.60%	38.70%	297,328
Downstate	10-38	29	47.90%	46.80%	313,334
Long Island	1-9	9	14.50%	14.50%	305,990

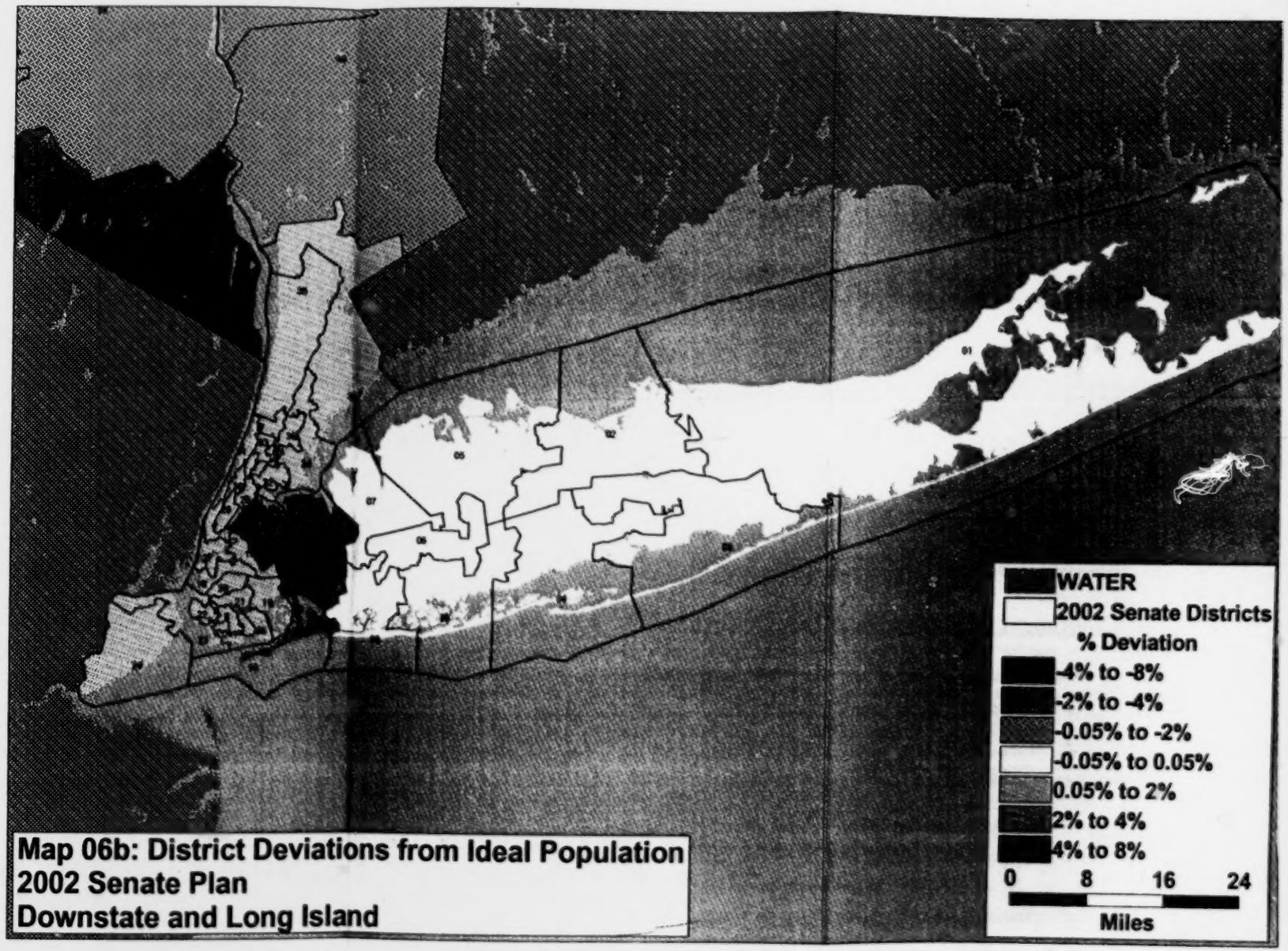
Table 10. 2002 Plan District Population and Deviation

2002 Districts	2000 Pop.	Deviation	Pct. Dev.	2002 Districts	2000 Pop.	Deviation	Pct. Dev.
1	305,989	-83	-0.03%	35	311,259	5,187	1.69%
2	305,990	-82	-0.03%	36	311,259	5,187	1.69%
3	305,989	-83	-0.03%	37	311,260	5,188	1.70%
4	305,991	-81	-0.03%	38	320,851	14,779	4.83%
5	305,990	-82	-0.03%	39	305,749	-323	-0.11%
6	305,993	-79	-0.03%	40	303,372	-2,700	-0.88%
7	305,991	-81	-0.03%	41	301,528	-4,544	-1.48%
8	305,990	-82	-0.03%	42	301,290	-4,782	-1.56%
9	305,990	-82	-0.03%	43	302,261	-3,811	-1.25%
10	318,481	12,409	4.05%	44	302,248	-3,824	-1.25%
11	318,482	12,410	4.05%	45	299,603	-6,469	-2.11%
12	318,484	12,412	4.06%	46	294,565	-11,507	-3.76%
13	318,484	12,412	4.06%	47	291,303	-14,769	-4.83%
14	318,481	12,409	4.05%	48	290,925	-15,147	-4.95%
15	318,484	12,412	4.06%	49	291,303	-14,769	-4.83%
16	318,483	12,411	4.05%	50	291,303	-14,769	-4.83%
17	311,260	5,188	1.70%	51	291,482	-14,590	-4.77%
18	311,260	5,188	1.70%	52	291,961	-14,111	-4.61%
19	311,258	5,186	1.69%	53	294,378	-11,694	-3.82%
20	311,259	5,187	1.69%	54	291,303	-14,769	-4.83%
21	311,259	5,187	1.69%	55	301,947	-4,125	-1.35%
22	311,260	5,188	1.70%	56	301,947	-4,125	-1.35%
23	311,259	5,187	1.69%	57	295,288	-10,784	-3.52%
24	311,258	5,186	1.69%	58	298,637	-7,435	-2.43%
25	311,258	5,186	1.69%	59	294,256	-11,816	-3.86%
26	311,260	5,188	1.70%	60	298,636	-7,436	-2.43%
27	311,259	5,187	1.69%	61	298,635	-7,437	-2.43%
28	311,261	5,189	1.70%	62	301,947	-4,125	-1.35%
29	311,260	5,188	1.70%	**State Total**	**18,976,457**		
30	311,263	5,191	1.70%	**Mean**	**306,072**		
31	311,257	5,185	1.69%	**Minimum**	**290,925**		**-4.95%**
32	311,260	5,188	1.70%	**Maximum**	**320,851**		**4.83%**
33	311,258	5,186	1.69%	**Range**	**29,926**		**9.78%**
34	311,260	5,188	1.70%	**Average Deviation**	**6,793**		**2.22%**
				Standard Deviation	**8,337**		**2.72%**

Table 18. The 2002 Senate Plan and the Revised Plaintiffs' Plan Compared

	2002 Senate Plan	Revised Plaintiffs' Plan
Total Deviation (relative to ideal district population)	9.78%	4.87%
Population Range	29,926 (290,925 to 320,851)	14,915 (301,747 to 316,662)
Ratio, Largest to Smallest	1.10 : 1	1.05 : 1
Deviations	-15,147 to 14,779	-4,325 to 10,590
Percentage Deviations	-4.95% to 4.83%	-1.41% to 3.46%
Mean Deviation	2.22%	1.32%
Standard Deviation	2.72%	1.66%
Major Counties Divided (Counties with More Than the Ideal District Population, Divided by Districts Not Wholly Within the County)	11 (all except Queens)	12 (all)
Minor Counties Divided (Counties with Less Than the Ideal District Population)	11 (Cayuga, Chenango, Dutchess, Livingston, Niagara, Oneida, Ontario, St. Lawrence, Saratoga, Tompkins, Ulster)	9 (Dutchess, Herkimer,Montgomery, Niagara, Oneida, Rensselaer, Saratoga, Tompkins, Ulster)
Cities Divided in Westchester and Upstate	11 (Auburn, Buffalo, Mount Vernon, New Rochelle, Niagara Falls, Rochester, Rome, Saratoga Springs, Syracuse, Tonawanda, Yonkers)	5 (Buffalo, Niagara Falls, Rochester, Syracuse, Yonkers)
Minor Towns Divided in Long Island (Towns with Less Than the Ideal District Population)	3 (Babylon, Huntington, Oyster Bay)	3 (Babylon, North Hempstead, Oyster Bay) (Note: the territory of the town of Tonawanda, in Erie County, is also divided, but the population of the town is entirely within one district. A similar division is implicit in the 2002 Senate Plan.)
Villages and Unincorporated Hamlets (Census Places) Divided in Long Island (incorporated villages in boldface)	61 (Amityville, Baldwin, Baldwin Harbor, Bethpage, Bohemia, Brentwood, Central Islip, Commack, Copiague, Coram, Dix Hills,East Hills, East Islip, East Meadow, East Northport, Elwood, Farmingville, Fire Island, Fort Salonga, Franklin Square, Garden City, Great River, Greenvale, Greenwood Landing, Hauppauge, Hempstead, Hicksville, Holbrook, Islip, Islip Terrace, Lake Ronkonkoma, Lindenhurst, Lynbrook, Malverne, Malverne Park Oaks, Massapequa, Mastic, Medford, Melville, North Bellmore, North Great River, North Lindenhurst, North Wantagh, Northport, Oakdale, Old Westbury, Plainview, Port Jefferson Station, Rockville Centre, Roslyn Harbor, Sayville, Selden, Setauket-East Setauket, Shirley, South Farmingdale, South Huntington, Terryville, West Babylon, Woodbury, Wyandanch, Yaphank)	14 (Bay Shore, Commack, Coram, East Meadow, Farmingville, Fort Salonga, Franklin Square, Garden City, Hicksville, Islip, Merrick, Oyster Bay, Valley Stream, West Babylon)
Districts With African-American and/or Hispanic Voting-Age Majorities	14	16


WATER
2002 Senate Districts
% Deviation
-4% to -8%
-2% to -4%
-0.05% to -2%
-0.05% to 0.05%
0.05% to 2%
2% to 4%
4% to 8%
0 20 40 60
Miles
Map 06a: District Deviations from Ideal Population
2002 Senate Plan
New York State



Map 06b: District Deviations from Ideal Population
2002 Senate Plan
Downstate and Long Island

Memorandum

To: Sen. Skelos, Steve Boggess

CC: Vinny Bruy

From: Mark Burgeson

Date: 05/04/01

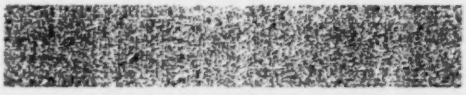
Re: Reapportionment Areas

Following is a description of a preliminary "Reapportionment Area" configuration.

I use the term reapportionment area to refer to a group of counties whose combined population will allow a whole number of Senate Districts to be drawn within the exterior boundaries of that group and be within an acceptable population deviation from the ideal. I emphasize that this is just one of many possible configurations. An additional note; I've arranged this configuration based on a 62-seat Senate, but have given deviations from both a 62- and a 61-seat Senate for the upstate and island areas. I did this because I operated on the assumption that east of the Nassau/Queens line and north and west of the Hudson R/A district, the basic number of districts will not change. It is within the New York R/A's that we will have wiggle room to draw districts at a 61- or 62-seat Senate. Thus, a 61-seat Senate would combine the Queens, Kings and Hudson areas to create a New York R/A starting at Queens/Nassau and running to Columbia/Albany. Instead of the 30 districts apportioned to that area, it would entail 29 districts @ 323,128, a deviation of +3.87%.

Ideal Population for 62 is 306,072; for 61 it is 311,089

R/A	Description, Population and Deviation (62 / 61)	
Long Island	Nassau & Suffolk	2,753,913
	9 districts @ 305,990	-.03% / -1.64%



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Queens	Queens	2,229,379
	7 @ 318,483	+4.05% /+2.38%
Kings	Kings	2,465,326
	8 @ 308,166	+.68%/-.9%
Hudson	Richmond, NY, Bronx, Westchester, Putnam, Dutchess, Columbia	
	4,676,021	15 @ 311,735 +1.85%/-.2%
Catskill	Rockland, Orange, Ulster, Sullivan, Delaware	
	927,890	3 @ 309,297 +1.05% / -.5%
Albany	Albany	
	294,565	1 @ 294,565 -3.76% / - 5.31%
Mohawk	Rensselaer, Saratoga, Fulton, Schenectady, Montgomery	
	604,509	2 @ 302,255 -1.25% / -2.84
Adirondack	Washington, Clinton, Hamilton, Warren, Essex, Franklin	
	299,603	1 @ 299,603 -2.11% / -3.69%

Binghamton Broome, Tioga, Cortland

300,919 1 @ 300,919 -1.68% / -3.27%

Onondaga Greene, Schoharie, Otsego, Chenango, Herkimer, Oneida, Madison, Onondaga, Cayuga, Oswego, Jefferson, St. Lawrence, Lewis 1,475,480 5 @ 295,096 -3.59% / -5.14

Western Wayne, Ontario, Seneca, Yates, Schuyler, Tompkins, Steuben, Chemung, Monroe, Livingston, Orleans, Genesee, Niagara, Erie, Wyoming, Chautauqua, Cattaraugus, Allegany

2,948,852 10 @ 294,885 -3.66% / -5.21%

Overall deviation at 62 is 7.81% (-3.76% ..+4.05%)

Overall deviation at 61 is 9.18% (-5.31%..+3.87%)

New York State Senate
Majority Redistricting Office
250 Broadway
New York, NY 10007

To: Sen. Skelos, Steve Boggess
From: Mark Burgeson
CC: Vinny Bruy
Date: June 21, 2001
Re: Westchester

This memo will discuss the particulars of how I determined the population total in Westchester to be connected to Bronx. Several parameters must be stated first. Should they change, the number will change as well. First, the size of the Senate will be 62 and districts will not cross the Hudson south of the 43rd in Rennselaer/Saratoga. Second, that the *reapportionment area* run from Kings county through Columbia county. Third, the 37th and 41st SD's be configured as follows. 41st: Columbia county and most of Dutchess county. 37th: the remainder of Dutchess, Putnam county and the towns of Cortland, Yorktown, Bedford, Mt. Kisco, Somers, North Salem, Lewisboro, Pound Ridge and the city of Peekskill (the actual combination of towns in southern Dutchess has yet to be determined, but would not change the resultant population in Westchester). This combination of towns allows the 37th and 41st to be drawn in such a manner that eliminates New Castle from the 37th, which in turn provides a bridge for the 36th (Oppenheimer) to Ossining (absence of both towns from the 37th makes it a stronger district). The second parameter is deduced from looking at three combinations of counties and determining the one which results in the greatest population in Westchester connecting to Bronx. Those combinations, with the resulting Bronx/Westchester number are as follows:

1. Hudson RA: Columbia, Dutchess, Putnam, Westchester, Bronx, New York & Richmond

a. Target Size Calculation

4,676,021	Total Pop
- 301,657	SD 41
- 303,243	SD 37
4,071,121	

13 Districts @ 313,163 +7,091 +2.32% from ideal 306,072

b. Bronx/Westchester calculation:

Total population of counties Bronx-Columbia	1,362,451
SD 41	- 301,657
SD 37	- 303,243
SD 36	- 313,163
SD 35	- 313,163
Total left in Westchester for SD's 33 & 34	131,225

2. Metro RA: Columbia, Dutchess, Putnam, Westchester, Bronx, New York, Kings, Queens & Richmond

a. Target Size Calculation:

9,370,726	Total Population
- 301,657	SD 41
- 303,243	SD 37
8,765,826	

28 Districts @ 313,065 +6,993 +2.28%

b. Bronx/Westchester calculation:

Total population of counties Bronx-Columbia	1,362,451
SD 41	- 301,657
SD 37	- 303,243
SD 36	- 313,065
SD 35	- 313,065
Total left in Westchester for SD's 33 & 34	131,421

3. Metro1 RA: Columbia, Dutchess, Putnam, Westchester, Bronx, New York, Kings & Richmond

a. Target Size Calculation

7,141,347	Total Population
- 301,657	SD 41
- 303,243	SD 37
6,536,447	

21 Districts @ 311,259 +5,187 +1.69%

c. Bronx/Westchester calculation:

Total population of counties Bronx-Columbia	1,362,451
SD 41	- 301,657
SD 37	- 303,243
SD 36	- 311,259
SD 35	- 311,259
Total left in Westchester for SD's 33 & 34	135,033

New York State Senate
Majority Redistricting Office
250 Broadway
New York, NY 10007

To: Sen. Skelos, Steve Boggess
From: Mark Burgeson
CC: Vinnie Bruy
Date: July 20, 2001
Re: Size of the Senate

We have had numerous discussions regarding the possibility of the Senate increasing in size to 63. While the ultimate decision will be made with political numbers for proposed districts at each size in hand, I believe that the decision basically comes down to the raw census numbers.

I have previously stated my contention that the only reason to go to 63 is to strengthen the Long Island delegation by combining politically undesirable areas in the extra district. There are no areas elsewhere in the state where we have the opportunity to pick up a district, or strengthen surrounding districts solely on the basis of adding another district to an area. In fact, as you will recall, our proposed redistricting areas upstate are already configured in such a manner as to draw districts *light*, to avoid migration downstate. Adding another district anywhere upstate would exacerbate that situation.

Initially, my thinking was that in going to 63 we would strengthen all nine members by carving out a tenth district strictly on the island, combining all the minority areas from Elmont on the Nassau/Queens border east to Brentwood in the town of Islip. This would serve the dual purpose of carving out politically undesirable areas and at the same time demonstrate sensitivity to testimony received at both the Nassau/Suffolk and Westchester public hearings. There are four major reasons mitigating against this scenario:

a. At a district population of 275,391, the deviation from the ideal for 10 districts on the island would be –8.57%. With a total permissible deviation of 10%, this would give us precious little room to maneuver elsewhere in the state;
b. While this minority district is theoretically possible, it is extremely unsightly and would most likely bring scrutiny ala Shaw v. Reno;
c. Senator Trunzo lives squarely within one of the major minority concentrations which would be included in the minority district (Brentwood).
d. The additional district almost certainly would not be a republican pickup. Thus, all else being equal, the republican majority would be 36-27

The next option under a 63-seat Senate I considered was to include Queens with Long Island. Under this scenario, there would be a minority district bridging Nassau/Queens, with approximately 115,700 in Nassau. That number is reasonably close to the population of the minority areas of Hempstead, Lakeview, Elmont, Roosevelt and Baldwin and could be combined with black areas in Jamaica to form a minority district. Several pertinent comments regarding this scenario:

a. Politically, this would certainly help Senators Skelos, Fuschillo and Hannon.

b. We have received testimony that the minority areas in Hempstead should be together and this would accomplish that. The minority district is reasonably compact and should not run afoul of a Shaw v. Reno issue.
c. In this configuration, the Nassau/Suffolk bridge district(s) would have a population of 246,829 in Suffolk and 46,306 in Nassau. It is not my job to be an advocate of one county over another, but the fact of the matter at hand is that we currently have two Nassau-based Senators whose districts comprise portions of Suffolk county. The political reality is that it is extremely unlikely that Nassau (despite any agreement between the two county's organizations) would be able to control a bridge district(s) in which only 15% is in Nassau county; and that, in turn, while not necessarily meaning the loss of a republican seat, would mean the loss of an incumbent.
d. An additional county line cut (Nassau/Queens).
e. As above, the additional district would not likely be taken by a republican and the majority would stand at 36-27, all else being equal.

Finally, I looked at a reapportionment area which stretches from Suffolk to Columbia county. This would result in a district size of 303,151, of which several comments can be made:

a. The Nassau portion of the Nassau/Queens bridge district would contain a population of only 25,554. That few people would be of negligible political value.
b. Although the Nassau/Queens bridge would be a minority district, the above mentioned minority areas in Hempstead (with the exception of Elmont) would still need *attention*.
c. The Nassau/Suffolk district(s) would be a 32%/68% split. Not quite the current 44%/56% split, but closer than the above15%/85% split. Enough to avoid the loss of Nassau county control of that seat(s)? Hard to tell.
d. Another county line cut (Queens/Kings).
e. Again, unlikely that the additional district would be a republican pickup.

New York State Senate
Majority Redistricting Office
250 Broadway
New York, NY 10007

Memorandum

To: Senator Skelos
From: Mark Burgeson
CC: Vinny Bruy
Date: December 18, 2001
Re: "The 135"

There seems to be a bit of confusion over the provenance of the population number in Westchester which is to be attached to Bronx County. There has been some speculation that this number has been arbitrarily chosen out of thin air. It has not. It is arbitrary only to the extent of selecting which of several combinations of counties is to be used for this Reapportionment Area (R/A).

Through the examination of various combinations of counties, the following combination (which I'll call the Hudson R/A) maximizes the Westchester portion attached to Bronx.

Following are some numbers and calculations which I hope will better illustrate how this figure was determined. The process requires two distinct steps: **A.** determination of the size of Senate districts in the Hudson R/A; and, **B.** another calculation to determine the portion of Westchester attached to Bronx.

A. Senate District size calculation

First, calculate the total population of the Hudson R/A.

Hudson R/A: (Columbia, Dutchess, Putnam, Westchester, Bronx, New York, Richmond & Kings):

Kings	2,465,326
Richmond	443,728
New York	1,537,195
Bronx	1,332,650
Westchester	923,459
Putnam	95,745
Dutchess	280,150
Columbia	63,094
Total	7,141,347

In order to craft districts whose population falls within the acceptable overall deviation of 10%, 23 Senate districts, stretching from Brooklyn to Columbia County, are drawn at a population of 310,493. Because of manipulation of town combinations in Dutchess and Westchester, I was able to take advantage of the NYS Constitution's "town on border" rule and draw the Saland and Leibell districts a little bit "lite" at 301,541 and 303,359 respectively. This has the effect of further increasing the Westchester portion over what it would have been with the Saland and Leibell districts being drawn at 310,493. Subtracting the populations of those two "lite" districts now leaves a remaining population in the Hudson R/A of 6,536,447.

7,141,347	
- 301,541	Saland SD
- 303,359	Leibell SD
6,536,447	Total remaining in Hudson R/A

Dividing this remaining total by 21 gives us a district size of 311,259 for the remaining 21 SD's in this R/A. Because of the NYS Constitution's "block on border" rule, the size of the districts within the city and lower Westchester will each be within one or two of this 311,259 size, simply because you will almost always be able to find a block with small enough populations to equalize the districts.

21 Districts @ 311,259

B. Bronx/Westchester calculation:

Total population of counties Westchester-Columbia		1,362,451
SD 41	Saland	- 301,541
SD 40	Leibell	- 303,359
SD 37	Oppenheimer	- 311,259
SD 35	Spano	- 311,259
Total left in Westchester to be attached to Bronx		**135,033**

This total is set. It be changed only by adjusting the R/A itself. For example, it would be possible to create an alternate R/A which attaches Queens County to the above Hudson R/A. Running the same above calculations for this new R/A would result in a Westchester total of 131,418 connected to Bronx. Likewise, another adjustment to the R/A would be to add Nassau & Suffolk counties. Again, running the same above calculations results in a Westchester total of 134,515. Thus, there is method (maximizing the Westchester total), not arbitrariness in selecting which R/A to use in calculating the portion of Westchester connected to Bronx.

The only consideration now, is how (or if) it is divided between Senators Velella and Hassell-Thompson. If it is not divided, and Senator Velella receives the entire "135", I would suggest that the U.S. Justice Department would look unkindly on eliminating a minority legislator.

In The Matter Of:

ERIC RODRIGUEZ, et al. v.
LATINO VOTING RIGHTS COMMITTEE OF METRO NEW YORK, et al.

MARK BURGESON
September 19, 2003

RAYVID REPORTING SERVICE, INC.
420 Lexington Avenue - Suite 2108
New York, NY 10170
PH: 212-599-3642 / FAX: 212-692-9171

BURGESON, MARK - Vol.

average actual voter turnout for the three areas for three different years and three different -- well, two different races and enrollment for those three years.

Q Why did you put this in your report?

A Because of the one person, one vote.

In the litigation I believe, and correct me if I'm wrong, but one of the complaints is the over -- the alleged overpopulation of the New York City districts results in a dilution of votes in New York City, which is why I put this progression from the citizen voting age population to the voting enrollment to the actual voting turnout.

That's why --

Q What I am asking you is if you have any information, authority, or basis to point to these types of numbers as a defense to a claim that the legislature did not make a good faith effort at population equality?

MR. CARVIN: Objection, asked and answered.

Q You can answer.

A Well, the legislature did make a good faith effort for population equality, because the districts in the 2002 plan fall within the acceptable 10 percent deviation and plus or minus 5 -- no district is greater than a 5 percent deviation.

Q That's your view, isn't that correct?

A No, that's -- that is correct.

Q What relevance to that proposition that you say they made a good faith effort does voting age population, citizen voting age population, enrollment, turnout, have to do with that claim?

MR. CARVIN: Objection, mischaracterizes his prior testimony.

Q You can answer.

What relevance does that have?

A As I said --

Q I am trying to understand why it's in your report.

A Okay, first, the legislature achieved a good faith effort in population

equality because all the districts, the maximum deviation is within 10 percent. With an informal dividing line, no district shall be or should be more than 5 percent.

Secondly, it's my understanding one of the complaints was a dilution of New York City votes, and that's why I did this analysis of citizen voting age per Senate district, enrollment per Senate district, and actual voting turnout per Senate district.

Q What I am asking is, I understand now what you are trying to say, and what I am asking is can you point to any authority of any type or any information of any type which provides any basis to deviate from equal population on the basis of these numbers?

MR. CARVIN: Objection.

Q I am asking you hypothetically. You don't have to tell me what the legislature did.

Hypothetically, as an expert, can you point to any information which permits or justifies deviation from equal population based on other numbers, anything other than

population per district?

MR. CARVIN: Objection. He's told you four times that there is no deviation from population equality.

MR. EMERY: I am not there.

Q Exact population equality, deviation -- is there any -- do you understand the question at this point?

A Is there any justification for deviation from exact population equality?

Q Based on these numbers?

Based on the things you put in this report.

A I don't understand that.

Q Let me make it simple and then we will try to go to lunch and stop for a little while.

Can you cite any information or authority for the proposition that a state is allowed to deviate from exact population on the basis of, for the reason of citizen voting age population, voting age population, enrollment, turnout, participation, are any of those things that you write in this report relevant in any

In The Matter Of:

ERIC RODRIGUEZ, et al., v.
LATINO VOTING RIGHTS COMMITTEE OF METRO NEW YORK, et al.,

MARK BURGESON
September 26, 2003

RAYVID REPORTING SERVICE, INC.
420 Lexington Avenue - Suite 2108
New York, NY 10170
PH: 212-599-3642 / FAX: 212-692-9171

BURGESON, MARK

Mark Burgess

MR. EMERY: Let's take off the top one.

Q. Is that the memo that I just described, in fact it's Bates numbers at the bottom right S 21404 and 21405?

A. Yes.

Q. This one was approximately six months or so after the other two, six or seven months after the other two we have been looking at, the end of 2001?

A. Yes, approximately six months.

Q. At the top of page 2 of this memo you speak do you not of "districts whose population falls within the acceptable overall deviation of 10 percent", do you see the first sentence there?

A. That's correct, according to the memo.

Q. I think this is a question also just to be clear about your testimony in your last deposition as well, does this reflect your view that the population of 10 percent is acceptable in and of itself, once you reach 10 percent it's acceptable?

Mark Burgess

A. That's my understanding of what the Supreme Court has allowed in joint districts.

Q. Just to be clear, is it your understanding that any redistricting plan with a deviation below 10 percent is acceptable under one person one vote principles?

MR. CARVIN: This is going back to the expert deposition.

MR. EMERY: I want to be clear about his view of this because I looked at the expert deposition and it was a little fuzzy.

MR. CARVIN: You should have asked him that because that's not the purpose of this deposition. Can you read the question back.

(Question read.)

A. My understanding and again I'm not a lawyer, my understanding is the Supreme Court in state legislative plans allows deviations, overall deviation of 10 percent.

Q. Looking at page 2, does this memorandum indicate the size of the population from Westchester County that is to be included in one or more of the combined Westchester/Bronx districts?

Mark Burgess

A. Do you mean Soland and Leibell?

Q. Let me ask it this way. The overall question about this memo, does it indicate that the size of the population from Westchester County that is to be included in one or more combined Westchester/Bronx districts is strictly to be determined by the selections of the counties that are to form the reapportionment area?

MR. CARVIN: Can you read back the question.

(Question read.)

MR. CARVIN: The same admonition as before, to the extent you can understand it, if not, perhaps you can provide an arithmetical solution.

A. This is basically a recap of the exhibit that we were discussing previous, it's almost the same memo, it's just a recap.

Q. Let's go into it a little bit then. In the title the quote "The 135", does that refer to the number 135,033 that appears in the boldface on the second page of the memorandum, the 135,000 people that would be put into Westchester and included in the Westchester/Bronx

Mark Burgess

districts?

A.

MR. CARVIN: Are you asking him based on the memo?

Q. The reference to the title, the re line at the top. Does that 135 refer to the population 135,033?

A. In reviewing the memo I would say that's accurate.

Q. Does the Bronx/Westchester 34th Senate district in the 2002 plan contain 93,956 Westchester County residents?

MR. CARVIN: Are you representing that you got that from LATFOR.

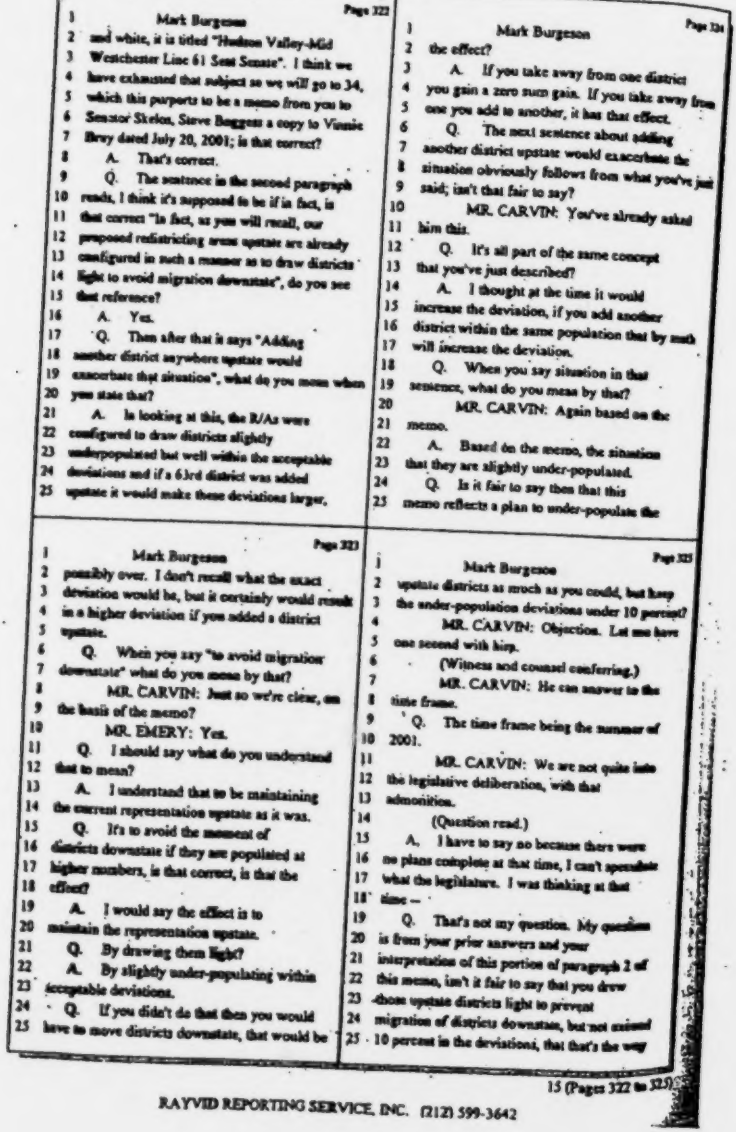
A. Yes.

MR. EMERY: Yes, I am.

Q. Does the second Bronx/Westchester district, the 36th, contain 41,073 Westchester residents? I will represent to you also that's the number in the Senate plan from LATFOR.

A. That sounds about right.

Q. The total in the Senate plan for these two districts is exactly the 135,029 as opposed to 135,033 that was calculated on



Page 322
Mark Burgeson
and white, it is titled "Hudson Valley-Mid Westchester Line 61 Sent Senate". I think we have exhausted that subject so we will go to 34, which this purports to be a memo from you to Senator Skelos, Steve Boggess a copy to Vinnie Bray dated July 20, 2001; is that correct?
A. That's correct.
Q. The sentence in the second paragraph reads, I think it's supposed to be if in fact, in that correct "In fact, as you will recall, our proposed redistricting areas upstate are already configured in such a manner as to draw districts light to avoid migration downstate", do you see that reference?
A. Yes.
Q. Then after that it says "Adding another district anywhere upstate would exacerbate that situation", what do you mean when you state that?
A. In looking at this, the R/As were configured to draw districts slightly underpopulated but well within the acceptable deviations and if a 63rd district was added upstate it would make these deviations larger,

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possibly over. I don't recall what the exact deviation would be, but it certainly would result in a higher deviation if you added a district upstate.
Q. When you say "to avoid migration downstate" what do you mean by that?
MR. CARVIN: Just so we're clear, on the basis of the memo?
MR. EMERY: Yes.
Q. I should say what do you understand that to mean?
A. I understand that to be maintaining the current representation upstate as it was.
Q. It's to avoid the movement of districts downstate if they are populated at higher numbers, is that correct, is that the effect?
A. I would say the effect is to maintain the representation upstate.
Q. By drawing them light?
A. By slightly under-populating within acceptable deviations.
Q. If you didn't do that then you would have to move districts downstate, that would be

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the effect?
A. If you take away from one district you gain a zero sum gain. If you take away from one you add to another, it has that effect.
Q. The next sentence about adding another district upstate would exacerbate the situation obviously follows from what you've just said; isn't that fair to say?
MR. CARVIN: You've already asked him this.
Q. It's all part of the same concept that you've just described?
A. I thought at the time it would increase the deviation, if you add another district within the same population that by math will increase the deviation.
Q. When you say situation in that sentence, what do you mean by that?
MR. CARVIN: Again based on the memo.
A. Based on the memo, the situation that they are slightly under-populated.
Q. Is it fair to say then that this memo reflects a plan to under-populate the

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upstate districts as much as you could, but keep the under-population deviations under 10 percent?
MR. CARVIN: Objection. Let me have one second with him.
(Witness and counsel conferring.)
MR. CARVIN: He can answer to the time frame.
Q. The time frame being the summer of 2001.
MR. CARVIN: We are not quite into the legislative deliberation, with that admonition.
(Question read.)
A. I have to say no because there were no plans complete at that time, I can't speculate what the legislature. I was thinking at that time --
Q. That's not my question. My question is from your prior answers and your interpretation of this portion of paragraph 2 of this memo, isn't it fair to say that you drew those upstate districts light to prevent migration of districts downstate, but not exceed 10 percent in the deviations, that that's the way

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No. 04-218

In the
Supreme Court of the United States

ERIC RODRIGUEZ, MARTIN MALAVE-DILAN, HOWARD T. ALLEN, JEANNETTE SANTOS, DONALD J. JIRAK, RICHARD FLATEAU, CHARLOTTE A. TAYLOR, MERVYN A. CAMPBELL, SARAH BROCKUS, PATRICIA McDOW, LISA BEST, VICTOR OLUWOLE, RUBEN RANGEL, RUSSELL VELAZQUEZ, GUILLERMO LINARES, ISABEL EVANGELISTA, MARTHA PEPIN, MARISEFA REYES, MARIA URENA, TYRONE ZIMMERMAN, JOSE ALVARADO, IRVIN R. McMANUS, WAYNE HALL, SAMUEL PRIOLEAU, WILLIAM RODRIGUEZ, NEVILLE MULLINGS, MARY ADAMS, EUGENE A. BURNETT, HAZEL PALMORE, and JOHNNY VELEZ,

Appellants,

– against –

GEORGE E. PATAKI, Governor of the State of New York,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPPOSITION TO MOTION TO AFFIRM

DAVID T. GOLDBERG
99 Hudson Street, 8th Floor
New York, New York 10013

H. REED WITHERBY
SMITH & DUGGAN, LLP
2 Center Plaza
Boston, Massachusetts 02108

RICHARD D. EMERY*
ERIC HECKER
EMERY CELLI BRINCKERHOFF
& ABADY LLP
545 Madison Avenue
New York, New York 10022
(212) 763-5000

* *Counsel of Record*

Attorneys for Appellants

MARY O. DONOHUE, Lt. Governor and President of the Senate of the State of New York, ELIOT SPITZER, Attorney General of the State of New York, JOSEPH L. BRUNO, President *Pro Tempore* and Majority Leader of the Senate of the State of New York, SHELDON SILVER, Speaker of the Assembly of the State of New York, DAVID A. PATERSON, Minority Leader of the Senate of the State of New York, CHARLES NESBITT, Minority Leader of the Assembly of the State of New York, and CAROL BERMAN, NEIL W. KELLEHER, HELENA M. DONOHUE, and EVELYN J. AQUILA, Commissioners of the New York State Board of Elections,

Appellees.

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PRELIMINARY STATEMENT

This case squarely presents the question of what legal standards govern a population equality challenge to a state legislative redistricting plan with a total population deviation just under ten percent, and whether partisan motivation is a legitimate justification for such a deviation. *Cox v. Larios*, 124 S. Ct. 2806 (2004), settled that such claims are cognizable and that partisanship is not a legitimate justification. The court below, however, held that challenges under ten percent may not be maintained unless it is proven that illegitimate reasons were the *sole* cause of the deviation, and that partisanship is a legitimate reason for deliberately deviating from population equality. If these rulings are correct, then *Larios* is a dead letter.

Defendants attempt to divert attention from these important legal issues by asserting that the facts were decisive in this case, and that the stark geographic pattern of population deviations evident in the 2002 Senate Plan just "happens" to have emerged from the conscientious application of "neutral" principles. Mot. at 20. Defendants conveniently ignore, however, that this is a *summary judgment* case, in which the facts must be viewed in the light most favorable to Plaintiffs, and in which Plaintiffs must be afforded the benefit of all reasonable inferences. Notably absent from Defendants' motion to affirm is any mention of the copious evidence in the record—evidence that this Court is bound not just to consider but to *credit*—demonstrating that the 2002 Senate Plan was the result of rank partisan and regional discrimination:

- That the drafters of the Plan purposefully drew the "upstate" districts "*light*, to avoid migration [of a district] downstate";
- That the drafters "took advantage of" the opportunity to "manipulat[e] town combinations" in order to draw upstate districts "lite" [sic];
- That the drafters decided which counties to keep intact by "determining" which "combinations of counties" would "result[] in the greatest population in Westchester connecting to Bronx," thereby shoring up a Bronx Republican incumbent;

- That the drafters concluded that further manipulation would not give the Republicans an "opportunity to pick up a district" upstate because all of the upstate districts had already been drawn as "light" as possible; and
- That once the drafters identified a way to bring the total population deviation just a whisper below ten percent, no further effort was made to reduce or eliminate population deviations.

The undisputed evidence confirms that the "neutral" principles cited by Defendants were not the true reasons for the deviations, but rather are pretexts for Defendants' conscious scheme to subordinate the goal of population equality to the desire to maximize partisan and regional domination. Defendants attempt to portray the regional malapportionment as insignificant, but if that were true they would not have gone to such lengths to manufacture it.

Defendants' posturing aside, it is obvious that the district court's decision below cannot stand alongside this Court's affirmance in *Larios*. *Larios* means either that regional population discrimination claims under ten percent are viable, or that partisanship is not a legitimate basis for departing from population equality, or both. The district court below effectively held that neither type of claim is viable. Notably, this case almost certainly presents this Court's last chance before the 2010 Census to provide guidance to legislatures and lower courts with respect to the proper framework for evaluating population discrimination claims where the total deviation is less than ten percent. Plenary review is warranted.

ARGUMENT

I. Plaintiffs Have Demonstrated Unconstitutional Population Discrimination

A. The Desire to Maximize Partisan Advantage Is Not a Legitimate Basis for Deviating From Population Equality

Defendants struggle mightily to avoid the issue of partisanship, suggesting that the court below "never

entertained the possibility" that the population deviations in the 2002 Senate Plan were justified by partisanship. Mot. at 23, 24. That is false. The court expressly required Plaintiffs to demonstrate that something *other* than partisan motivation caused the population deviations, thus unmistakably elevating partisanship to the status of a legitimate justification for departing from population equality:

> Just as in the racial context where courts must deal with the overlap of racial identity and partisan identification and still conclude that the districting is racially—and not simply politically—drawn to find an equal protection violation, *see, e.g., Easley v. Cromartie*, 532 U.S. 234 (2001), so in the one-person, one-vote context must the plaintiffs who challenge a plan with less than a ten-percent deviation present some evidence that the districting can be traced to impermissible considerations. In New York State, the traditional correlation between 'upstate' districts and Republican political identification (21 out of 24 incumbent Senators upstate are Republican) means that the plaintiffs here needed to proffer more than a mere assertion of a Senate conspiracy for 'upstate' ascendancy to meet their burden of showing a violation of the one-person, one-vote principle.

J.S. 30a.[1]

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[1] The district court's decision to take judicial notice of these political realities was not, as Defendants suggest, unprompted. Rather, Defendants had argued, in response to Plaintiffs' racial gerrymandering claim, that the Legislature's political motivations were, as Defendants put it, "blazingly obvious." The district court accepted that rationale, explaining that "it would be naïve to suggest that all of New York's assemblypersons and senators were unaware of the political import and stakes, and details, of the 2002 redistricting," J.S. 170a, and crediting Defendants' claim that the "political explanation is so blazingly obvious." *Id.* n.173. The question for this Court is whether "blazingly obvious" partisanship is a legitimate justification for deliberately deviating from population equality.

In a thinly veiled attempt to sidestep this key issue, Defendants repeatedly observe that Plaintiffs have not brought a partisan gerrymandering claim under *Davis v. Bandemer*, 478 U.S. 109 (1986). That is true, but entirely irrelevant. The issue in cases like *Davis* and *Vieth v. Jubilerer*, 124 S.Ct. 1769 (2004), is whether a plan that complies with the equal representation mandate should nonetheless be invalidated on the grounds that boundaries of equipopulous districts were drawn in a way that dilutes the voting strength of an identifiable political group. The question here is entirely different: whether *a departure from equality* can be justified based on partisanship. *See Davis*, 478 U.S. at 124 ("The issue here is of course different from that adjudicated in *Reynolds*. It does not concern districts of unequal size."). As this Court has recognized, the difficulty in divining a standard to govern political gerrymandering cases is a reason *for*, not against, requiring legislators to adhere to the easily understood and readily applied equal representation standard. *See Larios*, 124 S. Ct. at 2808 (Stevens, J., concurring) ("[T]he equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength."); *see also Reynolds v. Simms*, 377 U.S. 533, 578-79 (1964) (recognizing that judicial enforcement of equal representation duty counteracts "partisan gerrymandering").

The decision below simply cannot stand alongside *Larios*, which treated the pursuit of partisan advantage as an illegitimate reason for departing from population equality. When 2010 arrives, legislators inevitably will view *Larios* as forbidding deviation from equality on the basis of partisan motivation, but will view this case as approving such motivation so long as it is accompanied by some minimal lip service to a permissible alternative objective. It is imperative that this Court clarify which view is correct.

B. Plaintiffs Have Demonstrated Impermissible Regional Discrimination

Incredibly, Defendants suggest that judicial scrutiny of the regional discrimination evident in the 2002 Senate Plan is inappropriate because the Plan could have been drawn by a

"neutral redistricting commission." Mot. at 23. The reality, however, is that the Plan was *not* drawn by a neutral commission, but rather by Senate Republicans. Moreover, even a cursory glance at the map confirms that the drafters were anything but "neutral." It is simply inconceivable that a "neutral" drafter would devise a plan in which every single upstate district is underpopulated and every single downstate district is overpopulated.

Defendants also attempt to evade Plaintiffs' regional discrimination claim by arguing that upstate New York and downstate New York are not "identifiable regions," and that the downstate region has been defined by Plaintiffs "solely by overpopulated territory." Mot. at 9, 10. Defendants conveniently ignore, however, that it was *the drafters of the Plan themselves*—not Plaintiffs—who labeled as "upstate" those districts that were to be deliberately underpopulated in order to prevent the reapportionment of a district to what they labeled the "downstate" region of the State. Those are the words of the Plan's chief architect, not Plaintiffs. J.S. 279a.

In any event, the evidence in the record confirms that the amount of malapportionment between the upstate and downstate regions *would be precisely the same* if Long Island were considered part of downstate, and *would be virtually the same* if Rockland or Orange Counties were excluded from downstate or if Westchester County were included in its entirety. J.S. 251a-252a & n.1. Thus, the suggestion by Defendants and by the court below that Plaintiffs' use of the terms upstate and downstate was "self-serving" (Mot. at 9; J.S. 31a) is doubly unavailing. The Plan's drafters used those terms long before Plaintiffs did, and marginal adjustments to those regional definitions would have made no difference.[2]

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[2] Nor is there any truth to Defendants' baseless claim that the portions of the downstate region located just outside of New York City have "nothing in common with the City." Mot. at 9. It is undisputed that the 29 contiguous districts in the downstate region correspond very closely with the New York State part of the New York/New Jersey Metropolitan Division of the NY/NJ/PA Metropolitan Statistical Area, defined by the Office of

Defendants also attempt to deflect this Court's attention from the Plan's purposeful population discrimination by focusing on citizen voting age population ("CVAP") statistics, rather than total population statistics. It is undisputed, however, both that the New York Constitution requires districts to be apportioned on the basis of total population, not CVAP, *see* N.Y. CONST. art. III, § 5-a, and that the Legislature *had no access* to CVAP statistics when it considered and enacted the 2002 Senate Plan. It therefore could not have been the Legislature's purpose—the touchstone of the constitutional analysis—to "enhance" the voting strength of the downstate region. Tellingly, Defendants cite no authority for the curious proposition that total population statistics are a mere "proxy" for "voting equality." Mot. at 12. To the contrary, this Court has repeatedly reaffirmed that the equal population principle requires "equal *representation* for equal numbers of *people*." *Reynolds*, 377 U.S. at 559-60 (quoting *Wesberry v.* , 376 U.S. 1, 18 (1964)) (emphasis supplied).

Finally, Defendants argue that regional discrimination is not actionable absent a showing of "animus"—*i.e.*, an actual "purpose . . . to harm" the disadvantaged region. Mot. at 14-15, 22. Defendants cite no authority for this proposition, however, nor could they. Indeed, in *Reynolds*, there was not a shred of evidence that the legislators specifically intended to inflict harm on the residents of the underrepresented districts; to the contrary, the legislators wished only to perpetuate their power. *See Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring) (discussing difference between animus and intent).

Management and the Budget and the Census Bureau as an area with a high degree of economic and social integration. J.S. 251a. Moreover, the record contains both the expert report of Dr. Gerald Benjamin, which demonstrates in great detail the persistence of upstate/downstate regional divisions in the politics and governance of New York State, and the testimony of the court-appointed special master, who explained that residents of the Bronx and Westchester "share common interests and outlooks."

Once again, the decision below cannot possibly be squared with *Larios*, which struck down Georgia's redistricting plan because of impermissible "regionalism – namely, a desire by rural and inner-city Atlanta legislators to retain their legislative influence even as the population of these areas has languished in comparison to the high-growth areas of north Georgia." 300 F. Supp. 2d at 1342.[3] The regional discrimination claims in this case and in *Larios* are indistinguishable, and this Court should avoid the confusion that would be certain to follow a summary affirmance here.

C. The Evidence Confirms That the Deviations Were Not "Necessary to Comply With Legitimate Redistricting Principles"

Despite their conscious litigation choice not to proffer *any* evidence of why the districts *actually* were drawn with substantial population deviations, Defendants stubbornly insist, through counsel, that the deviations were "necessary" to comply with various "legitimate" redistricting principles. Each of Defendants' claims is demonstrably false – under any standard, and certainly under the summary judgment standard that applies.

Defendants' contention that the population deviations were the inevitable result of New York's block-on-border and town-on-border rules, Mot. at 10-11, is difficult to take seriously. The evidence is undisputed, and the Plan's chief architect conceded below, that the upstate region is *replete* with violations of the block-on-border and town-on-border rules. Moreover, the record contains direct, incontrovertible evidence that the drafters of the Plan "*took advantage of*" the town-on-border rule in order to *purposefully underpopulate* upstate districts. J.S. 282a (emphasis supplied). It is therefore most peculiar – "other-worldly," to borrow from Defendants'

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[3] The district court's finding that the definitions of upstate and downstate are "self-serving" directly conflicts with *Larios*, which found unconstitutional regional discrimination notwithstanding the fact that "the various witnesses had different ways of defining the boundary between north and south Georgia." 300 F. Supp. 2d at 1323 n.1.

vernacular—that Defendants would attempt to pass off their undeniably deliberate scheme as the mere incidental result of a "neutral" application of state law.

It is equally curious that Defendants choose to press their specious claim that the deviations were necessary to further the "neutral" principle of preserving the Queens County border. As we have demonstrated, the rhetoric of Defendants' counsel is conclusively rebutted by uncontradicted evidence that the only reason the drafters kept Queens—but not adjoining Kings County (Brooklyn)—intact is that doing so enabled them to shift as much white population as possible into a vulnerable Republican district. J.S. 12, 14, 23.

With respect to the "neutral" goal of preserving incumbents, the undisputed evidence confirms that the Legislature did not observe any consistent or evenhanded policy. *See Brown v. Thomson*, 462 U.S. 835, 843, 845-46 (1983) (requiring "consistency of application" and "neutrality of effect" in applying nonpopulation redistricting criteria). The record is uncontradicted that two sets of downstate Democratic incumbents were paired in a naked partisan gambit, conspicuously leaving nearby open seats in both instances. Notably, Defendants' motion makes no attempt to offer a legitimate explanation for these gratuitous Democratic pairings. Rather, Defendants expressly conceded in their summary judgment brief that "pairing incumbents of only one party" is a "key indicator" or "partisan unfairness."[4]

Finally, Defendants contend that the deviations furthered the "neutral" principle of preserving the cores of existing districts. Mot. at 15-17. However, although *some* reconfiguration of districts certainly would have been required in order to effectuate the Census, Defendants have not even

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[4] This Court has endorsed, theoretically at least, the legitimacy of minimal population deviations to protect incumbents in the context of Congressional redistricting (based upon the greater Congressional clout of long-term Representatives), but it has never held that such a policy, particularly one that treats incumbents differently based on political affiliation, can justify a pattern of population discrimination in a *state* legislative plan.

attempted to demonstrate that the deviations could not have been reduced without violating the cores of existing districts.[5] Indeed, Plaintiffs' proposed redistricting plan, which appropriately shifted one district from upstate to downstate, amply preserved the cores of prior districts, with the average upstate district taking *more than two thirds* of its population from a single pre-existing district. J.S. 240a. The *configurations* of existing districts had to be changed, but the *cores* easily could have been preserved without doing violence to the Census.[6]

D. The District Court Applied the Wrong Legal Standard

Defendants attempt to distance the district court from the manifestly improper "sole reason" standard, suggesting that the court really applied an "actual reason" standard. Mot. at 22. It clearly did not. The district court *expressly adopted* the "solely" standard. J.S. at 24a-25a. Moreover, Defendants literally proffered *no evidence at all* regarding the "actual" reasons for the deviations, and Plaintiffs adduced a mountain of evidence both directly proving Defendants' bad faith and reducing their ex-post justifications to rubble.[7] On this record, summary judgment could not conceivably have been granted unless *any hint* of a "neutral" redistricting objective automatically defeats a population discrimination claim of almost ten percent as a matter of law.

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[5] The district court's special master gave much attention to preserving the cores of existing districts in his Congressional plan, even while drawing precisely equipopulous districts and reducing the number of districts by two.

[6] The New York Constitution, which *does* require the Legislature to endeavor to preserve towns and counties where possible, says *nothing* about preserving the cores of existing districts. Nor is there a "tradition" of preserving cores in New York redistricting. Quite to the contrary, when the downstate region lost significant population relative to upstate in the 1960s and 1970s, the subsequent redistricting plans did not sacrifice population equality to preserve the cores of prior districts. J.S. 237a-238a, 268a-269a.

[7] Defendants concede that merely invoking "neutral" principles means nothing "unless those objectives were the actual reasons for the deviations." Mot. at 22.

This case presents an ideal (and timely) vehicle for clarifying the circumstances under which deviations below ten percent are unconstitutional.[8] The question whether the district court applied the correct legal standard is a pure question of law that is ripe for resolution by this Court.

II. The "Legislative Privilege" Issue Is Substantial

Defendants' bold claim that the magistrate judge denied Plaintiffs the discovery in question on *relevance* grounds is ludicrous. The magistrate judge's orders confirm unambiguously that the issue was whether the discovery Plaintiffs sought was protected by "legislative privilege," not whether it was relevant. Because of these erroneous privilege rulings, Plaintiffs were denied the opportunity to adduce even *more* evidence of intentional population discrimination than the powerful evidence that is already in the record.

Defendants' response to Plaintiffs' waiver argument is wide of the mark. The point is not that Senator Bruno "w[as] sued" and "follow[ed] the Federal Rules." Mot. at 6, 29. The point is that Senator Bruno did not assert immunity from suit, removed the case to federal court, *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), and refused Plaintiffs' offer to dismiss him with prejudice.

CONCLUSION

The issue for this Court to decide is not, as Defendants would have it, whether "slavish adherence" to Census data is necessary, Mot. at 16, but rather whether the court below applied the proper standards for analyzing whether the Legislature engaged in the "honest and good faith effort" to achieve population equality that the Constitution requires. This Court should deny Defendants' motion to affirm and note probable jurisdiction.

Respectfully submitted,

---

[8] As demonstrated by the amici, lower courts differ wildly with respect to the appropriate legal standard governing population discrimination claims where the total deviation is below ten percent. *See* Amici Br. at 8-12.

Richard D. Emery *
Eric Hecker
Emery Celli Brinckerhoff & Abady LLP
545 Madison Avenue
New York, New York 10022
(212) 763-5000

David T. Goldberg
99 Hudson Street, 8th Floor
New York, New York 10013

H. Reed Witherby
Smith & Duggan LLP
2 Center Plaza
Boston, Massachusetts 02108

* Counsel of Record

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IN THE

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On Appeal From The United States District Court for the Southern District of New York

MOTION TO AFFIRM

C. DANIEL CHILL
GRAUBARD MILLER
600 Third Avenue
New York, NY 10016
(212) 818-8800

Counsel for Appellee Sheldon Silver, Speaker of the New York State Assembly

IRA J. LIPTON
HOGUET, NEWMAN & REGAL, LLP
10 East 40th Street
New York, NY 10016
(212) 689-8808

Counsel for Appellees George E. Pataki, Governor of New York State, and Mary O. Donohue, Lieutenant Governor of New York State

MICHAEL A. CARVIN
(*Counsel of Record*)
LOUIS K. FISHER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Appellee Joseph L. Bruno, President Pro Tempore *and Majority Leader of the New York State Senate*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the district court erred in rejecting Appellants' one-person, one-vote challenge to the New York State Senate redistricting plan, where: the plan's minor population deviations were required to serve the traditional redistricting principles of avoiding contests between incumbents and preserving the cores of prior districts; Appellants did not allege that the deviations were part of a partisan or racial gerrymander; and Appellants alleged "regional discrimination" but were unable to identify a cognizable region, show cognizable harm, or provide evidence of animus against any geographic area.

2. Whether the district court erred in denying Appellants' motion to compel only insofar as the motion sought production of confidential legislative documents that are wholly irrelevant to Appellants' claims.

3. Whether the district court erred in limiting the deposition of an expert witness to matters encompassed by his expert report, where the same person was deposed as a fact witness and the court did not order restrictions on the fact depositions of this or any other witness.

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COUNTERSTATEMENT OF THE CASE

Following the release of the 2000 census results, New York State's Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") held public hearings throughout the State and received written comments and proposals from the public regarding State Senate, Assembly, and congressional districts. J.S. 6a-7a. LATFOR then released an initial set of proposed plans, held a second round of public hearings, received additional public input, and transmitted its final set of proposed plans to the Legislature. *Id.* In April 2002, the Legislature and the Governor enacted legislation containing new Senate and Assembly districts, which were almost identical to LATFOR's proposals. J.S. 10a. In June 2002, the Legislature and the Governor enacted new congressional districts, and the United States Department of Justice "precleared" the three new plans under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. J.S. 12a-13a.

"[T]he 2002 Senate Plan reflects traditional districting principles including: maintaining equality of population, preserving the 'cores' of existing districts, preventing contests between incumbents, and complying with the requirements of the Voting Rights Act." J.S. 3a.

Under the 2002 Senate Plan, the maximum population deviation between two districts is 9.78% of the ideal district size, and, on average, a district's population deviates from the ideal size by 2.22%. J.S. 25a. More than half of all post-2000-census state legislative plans, including some court-drawn plans, have maximum deviations above 9%; of these 54 plans, only one has a lower average deviation than the challenged plan. Mot. to Affirm Appendix ("App.") 5a-6a.

As a result of the New York Constitution's "block-on-the-border" and "town-on-the-border" rules, the 2002 Senate Plan contains three groups of contiguous districts, within which all districts have similar population deviations. Districts 1-9 (covering Nassau and Suffolk Counties) have

virtually zero deviations; Districts 10-38 (covering New York City, Rockland County, and portions of Westchester and Orange Counties) are slightly overpopulated; and Districts 39-62 (covering the remainder of the State) are slightly underpopulated. J.S. 270a. The "block-on-the-border" and "town-on-the-border" rules cause this pattern because they result in virtually perfect population equality among districts within the same county, as well as among districts in adjacent counties that share a district.[1]

Much of the State's population growth during the 1990's was within New York City and, accordingly, the 2002 Senate Plan provides the City with one more Senate district than under the prior plan. Because the Legislature increased the size of the Senate from 61 to 62 seats,[2] the Plan accommodates the City's growth without reducing the

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[1] The state constitution provides that the population difference between two adjoining districts within the same county cannot exceed the population of a block (or town) on the border between the two districts. N.Y. Const. art. III, § 4. In other words, if the population difference can be reduced by shifting a border block (or town) from one district to another, then the block (or town) must be shifted. Where the blocks (or towns) are small, this rule results in nearly perfect population equality between two adjacent districts in the same county. And, because all districts within a county are contiguous, there is a "ripple effect" that results in virtual population equality among all districts in the county. In addition, where a district straddles a county line, the rule applies with respect to adjacent districts in *both* counties. As a result, the adjacent districts in *both* counties have the same population as the two-county district. Ultimately, due to the ripple effect, *all* districts in the two counties have essentially equal population. App. 6a-7a. In the 2002 Senate Plan, four of the five contiguous counties comprising New York City have cross-county districts, and the 21 districts in this area have populations that differ by no more than six people. J.S. 270a.

[2] As LATFOR's website noted, the state constitution contains a formula for determining the size of the Senate. N.Y. Const. art. III, §§ 3, 4. The Legislature is "accorded some flexibility in working out the opaque intricacies of the constitutional formula." *Schneider v. Rockefeller*, 31 N.Y.2d 420, 432, 293 N.E.2d 67, 74, 340 N.Y.S.2d 889, 899 (1972).

number of districts elsewhere in the State. The Legislature thereby avoided the substantial reconfiguration that would have been required by the elimination of a prior district. As a result, "the Senate Plan did apply the accepted principle of maintaining the core of districts" throughout the State. J.S. 34a n.34. In addition, the Legislature avoided a contest between incumbents, which would have been required if one of the prior districts had been eliminated. The Plan "has only two incumbent pairings" and "thus reflects a legitimate effort to avoid incumbent pairs."[3] J.S. 29a n.30.

In January 2003, Appellants and Plaintiff-Intervenors filed a nine-count amended complaint.[4] The one-person, one-vote count did not allege that the minor population deviations in the challenged plan reflected intentional race discrimination. J.S. 27a & n.29. Appellants also did not assert a Fourteenth Amendment "partisan gerrymandering" claim, J.S. 30a-31a n.31, or otherwise allege that partisan considerations impermissibly affected the 2002 Senate Plan. Instead, Appellants claimed that the population deviations of the Plan resulted from "regional discrimination." The allegedly disadvantaged "downstate" region consisted of the slightly overpopulated Districts 10-38, which covered New York

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[3] The 2002 Senate Plan also markedly improved the voting strength of New York's minority voters. The Plan includes two more majority-Hispanic voting-age population ("VAP") districts and one more majority-African-American VAP district than the prior plan. Of the 62 districts in the 2002 Senate Plan, eight are majority-African-American VAP, six are majority-Hispanic VAP, four additional districts are majority-minority VAP, and one is majority-white VAP with an African-American incumbent. J.S. 126a n.134.

[4] Appellants claimed that the Plan violated the Fourteenth Amendment's one-person, one-vote requirement; that the Plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by failing to include three more minority "coalition" or "influence" districts; and that the Plan's only majority-*white* district in Bronx County violated the Fourteenth Amendment under *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny.

City, half of Westchester County, all of Rockland County, and two towns in Orange County. Appellants gave no basis—*e.g.*, no set of common interests—for defining this area as a "downstate" region; their definition is based on nothing more than the fact that the area corresponds to the slightly overpopulated districts. J.S. 18, 31a.

Attached to the complaint was Appellants' revised proposed redistricting plan. Whereas Districts 10-38 in the 2002 Senate Plan are all slightly overpopulated, Districts 10-38 in Appellants' plan are all slightly underpopulated.[5] App. 1a-4a. This difference reflects the fact that Appellants' plan eliminates an "upstate" district and adds a new "downstate" district, *in addition to* the new "downstate" district already created through the increase of the Senate size to 62 seats.

By eliminating an "upstate" district, Appellants' plan necessarily creates a contest between two incumbents. The shift also destroys a prior district and requires substantial changes to the surrounding districts. Moreover, Appellants' plan creates rather than eliminates inequalities between "regions." Under the 2002 Senate Plan, the slight overpopulation of "downstate" is offset by the slight underpopulation of Assembly districts in the same area.[6] In

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[5] Appellants assert that, in the challenged plan, "every single downstate district is *substantially* overpopulated." J.S. 2 (emphasis added). In fact, 21 of the 29 "downstate" districts deviate from the mean by only 1.69 or 1.70%, which is only a hair above the 1.24% deviations of Appellants' plan. J.S. 270a. Seven of the eight other "downstate" districts with higher deviations are in Queens, and it is impossible to achieve lower deviations without drawing a district that crosses the county border, in violation of the whole-county policy embodied in the state constitution. N.Y. Const. art. III, § 4. Moreover, since Appellants misleadingly label the Queens districts as having deviations from "4% to 8%" (J.A. 8), it bears emphasis that *no* district deviates from the mean by 5% or more.

[6] New York City has 25.6 (41.3%) of 62 Senate seats and 65 (43.3%) of 150 Assembly seats. Thus, the City, with 42.2% of the State's population, has 42.7% of seats in the Legislature as a whole (42.3% of the Legislature if Senate seats are given greater weight). App. 18a-20a.

addition, New York City has 26 Senate seats (as opposed to 26.2 seats under a perfectly populated plan), "with a seat defined as representing a district controlled or predominantly controlled by city-based voters." J.S. 31a-32a. And New York City districts are substantially *under*populated in terms of eligible and enrolled voters. *See infra* p. 11. Appellants' plan's underpopulation of Districts 10-38, by contrast, would *exacerbate* the underpopulation of comparable Assembly districts; cause *greater* disproportionality between the number of New York City Senate seats (27) and the City's share under a perfectly populated plan (26.2); and *increase* disparities between "regions" in terms of eligible and enrolled voters. App. 9a, 15a, 17a, 19a-20a.

In March 2003, Appellees filed a partial motion to dismiss based upon, among other things, the fact that the Plan's maximum population deviation is less than 10%. The district court denied the motion to dismiss in its entirety.

In July 2003, Appellants moved to compel the production of documents by Appellee Joseph L. Bruno, the Senate Majority Leader. Senator Bruno had appeared in the case only after Appellants served him with a summons and complaint in early 2002. He had made a voluminous document production in response to discovery demands, while asserting privilege over those documents that reflected communications and deliberations of legislators and their aides. The magistrate judge ruled that, under federal common law, legislative privilege is a qualified privilege governed by a five-part balancing test. J.S. 198a-199a. Whereas Senator Bruno objected to the magistrate's rejection of an absolute privilege, Appellants did *not* challenge the magistrate's recognition of a qualified privilege. The district court affirmed the magistrate's order but reiterated the magistrate's emphasis that the order "does not relate to 'any depositions of legislators or their staffs.'" J.S. 209a.

Based on the guidelines set forth in the magistrate's original order, Senator Bruno produced hundreds of

additional documents while maintaining the assertion of privilege over a limited category. The magistrate then inspected the documents *in camera* and ordered the production of *all* documents except for those that were "akin to private discussions among legislators or between individual legislators and their aides" and, in all events, would have "add[ed] nothing to the discussion of the legality of the Senate majority's final plan." J.S. 213a, 214a. (The magistrate *did* compel the production of documents that reflected private legislative communications but were potentially helpful to Appellants' case.) Appellants objected neither to the magistrate's continued application of qualified privilege nor to his document-specific relevance determinations; instead, they maintained that the five-part balancing test required disclosure of *all* documents related to the specific districts they challenged. App. 38a-39a. Appellants also made a "waiver" argument (almost twenty months into the lawsuit and only ten days before the close of discovery), premised on a notion that Senator Bruno had voluntarily participated in the lawsuit by complying with Appellants' summons and then following the Federal Rules. In addition, Senator Bruno filed objections to the magistrate's order requiring production of additional documents. The district court affirmed. J.S. 228a-230a.

With respect to depositions, there was no order from the magistrate, and certainly no order affirmed by the district court, barring depositions of legislators, their aides, or any other fact witness. J.S. 1, 183a-232a. But Appellants did not depose any of these individuals, except for Mark Burgeson, "the primary drafter of the Plan." J.S. 10. In fact, their *only* unsuccessful argument as to depositions was that Mr. Burgeson, in his capacity as an expert on the Plan's *objective* characteristics, could be questioned regarding his and others' *subjective* thought processes in developing and enacting the Plan. App. 46a-47a. Although the magistrate and district court rejected Appellants' argument about Mr. Burgeson's *expert* deposition, there was no order or objection regarding

the scope of questioning at Mr. Burgeson's *fact* deposition, where Appellants were given wide latitude.

The district court granted Appellees' motion for summary judgment on several counts, including the one-person, one-vote claim. After trial on the remaining claims, the court entered judgment for Appellees on all counts.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE MINOR DEVIATIONS OF THE CHALLENGED PLAN ARE JUSTIFIED BY TRADITIONAL REDISTRICTING POLICIES AND ARE NOT ATTRIBUTABLE TO IMPERMISSIBLE FACTORS

Although Appellants struggle mightily to suggest that the court below applied an erroneous legal standard, the truth is that Appellants lost precisely and only because the undisputed evidence showed that they were unable to prove facts in support of their own legal theory. The district court *adopted* the legal framework advanced by Appellants. It held that a less-than-10% population deviation is *not* a safe harbor from a one-person, one-vote claim,[7] and that such a challenge will succeed if the plaintiff demonstrates that the deviations are actually attributable to an impermissible purpose. J.S. 21a-25a. This approach was identical to that of the district court in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 124 S. Ct. 2806 (2004), which Appellants hold up as the proper legal standard. As the court below made clear, in expressly distinguishing *Larios* on its facts,

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[7] This Court has held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case . . . under the Fourteenth Amendment so as to require justification by the State." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). "[A]s a general matter, . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

the only reason for the differing results is that, unlike the *Larios* plaintiffs, Appellants could not show that the population deviations were attributable to anything but traditional districting principles. J.S. 29a n.30, 34a n.34. Appellants offered no evidence that any aspect of the challenged plan was based on an impermissible or illegitimate purpose, much less that such a purpose—rather than the pursuit of legitimate redistricting principles—actually caused the population deviations at issue. The district court's fact-bound decision was correct, and it certainly presents no substantial question warranting this Court's plenary review.

A. Appellants' Claim of "Regional" Discrimination Would Fail If Such Claims Were Cognizable

Contrary to what their jurisdictional statement implies, the only allegedly impermissible motive that Appellants set out to prove was so-called "regional" or "geographic" discrimination. There is no contention or proof, for example, that the minor deviations were adopted to further an unlawful partisan gerrymander (under *any* definition of that concept), or were based on race discrimination. *See* J.S. 26a-27a & n.29, 30a-31a n.31. (Nor could there be such a contention, since it is undisputed that the plan provides equal treatment to *all* residents—minority and white, Democrat and Republican—within each alleged "region.") As explained below, moreover, there is no proof that the population deviations were attributable to alleged regional "animus." J.S. 22. To the contrary, the deviations concededly served the traditional districting principles of avoiding incumbent pairs and preserving existing district cores, as well as *minimizing* voter inequality. The plan here, therefore, plainly would satisfy *any* standard for determining the validity of minor population deviations—*i.e.*, those under 10%. For this reason, it is difficult to conceive of a worse vehicle for resolving the question of whether and when deviations below 10% constitute Fourteenth Amendment violations.

Nor can the case even shed general light on what, if anything, constitutes impermissible "regional discrimination." Under the undisputed facts, Appellants' hypothesized region is not an identifiable region; the votes of persons in the allegedly disadvantaged region are worth *more* than others in the State; and, to the extent that it is relevant, the region has proportional representation in the state legislature. Needless to say, a regional discrimination claim, whatever its legal merit in the abstract, cannot succeed unless there is a definable region and there is some discrimination.

1. Appellants' Definition of the Allegedly Disadvantaged "Region" Is "Self-Serving and Defective"

Importantly, Appellants do not challenge the accuracy of the district court's conclusion that their definitions of the "upstate" and "downstate" regions were "self-serving and defective" and "tailored to suit [Appellants'] litigation strategy." J.S. 18, 31a. Appellants claimed below that their "downstate" corresponded closely with New York City and its environs, but, in fact, their facially gerrymandered "downstate" excluded the two counties immediately to the east of the City on Long Island (Nassau and Suffolk Counties), included only half of the county immediately to the north of the City (Westchester County), veered abruptly across the Hudson River to include a county that is separated from the City by northeastern New Jersey (Rockland County), and proceeded northwest to pick up two towns in another rural county (Orange County) that has nothing in common with the City. J.S. 8. Thus, Appellants' hypothesized "downstate" region stretches to the Pennsylvania border and includes rural counties, but excludes all or half of each county that actually borders New York City. Moreover, contrary to Appellants' claim, there is no allegation or proof that the Plan contains "a built-in bias against voters living in the State's more populous counties." J.S. 16 (quoting *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653-

54 (1964)). To the contrary, all of the most populous counties outside of the City—Nassau, Suffolk, Westchester, and Erie (J.S. 267a)—are either *underpopulated* in part or whole or have districts with perfectly equal population.

Accordingly, Appellants now concede the district court's point that geographic areas are not "classified as 'downstate' [by Appellants] on any basis other than that they are overpopulated." J.S. 31a; *see* J.S. 18 (terms "upstate" and "downstate" were "used only as a shorthand description of the geographic areas that . . . [are] under- and over-populate[d]" in the challenged plan). Appellants plainly are incorrect when they assert (J.S. 18) that it is "absurd" to require a "region" to be defined by something more than geography corresponding with overpopulated legislative districts. Needless to say, if a "region" can be defined solely by overpopulated territory, then *any* plan with overpopulated districts—*i.e.*, any plan with less than perfect population equality—would contain an overpopulated "region" that is the product of "regional" discrimination vis-à-vis the underpopulated districts/"region." The lower court was thus quite correct to dismiss Appellants' completely circular and meaningless concept.

In this regard, Appellants repeatedly emphasize the so-called "systematic" nature of the overpopulation in the challenged plan—*i.e.*, the fact that the overpopulated districts are contiguous instead of scattered throughout the State. But it is undisputed that, far from suggesting any sort of "regional" animus, this "pattern" is simply a function of the New York Constitution's "block-on-the-border" and "town-on-the-border" rules, which require that districts within a county, as well as districts in adjacent counties that share a district, have almost precisely the same population. *See supra* p. 2. Thus, if one district in an area where districts cross county lines is overpopulated, then all districts in that area must be overpopulated to the same extent. This phenomenon is exemplified by *Appellants' own* proposed alternative plan, which contains precisely the same "pattern,"

only in reverse, with every so-called "downstate" district *under*populated instead of overpopulated. App. 1a-4a.

Of course, the fact that the New York Constitution causes similar population patterns in large groups of *contiguous* districts is of no federal constitutional moment. The rights and voting strength of citizens in overpopulated districts is not affected in any way by whether the underpopulated districts are nearby, or far away.

2. Appellants Are Unable to Show Any Disproportionality

The undisputed facts established that persons in the allegedly disadvantaged "downstate" region had *greater* voting strength than in "upstate" and thus were *favored* under the 2002 Senate Plan. As the court noted, "both parties stipulate that the New York City districts . . . [are] substantially *underpopulated* rather than overpopulated" in terms of eligible voters (citizen voting-age population) and registered voters. J.S. 32a. "According to the *plaintiffs'* CVAP figures, the New York City districts in the Senate Plan are *underpopulated* by 12.0% and 'upstate' districts are *overpopulated* by 15.4%. With respect to registered voters, the weight of one New York City resident's vote, depending on the district of comparison, is worth 29.9% to 63.6% *more* than an 'upstate' citizen's vote." *Id.* (emphasis added). Thus, the "practical effect of the Senate Plan . . . is to dilute the votes of '*upstate*' residents, *not* those who reside 'downstate.'" *Id.* (emphasis added).

In the face of this stark showing of *enhanced* voting strength in "downstate," Appellants' only response is that "the Legislature reapportioned on the basis of *total* population" and that the Fourteenth Amendment "protects 'persons,' not merely voting age citizens." J.S. 18, 19 (emphasis in original). That is, of course, true, but entirely irrelevant. The right afforded to "persons" under the Fourteenth Amendment in the "one-person, one-*vote*" context is, of course, "the right of all qualified *citizens* to

vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added). The Constitution thus requires "that the *vote* of any *citizen* [be] approximately equal in weight to that of any other *citizen* in the State." *Id.* at 579 (emphasis added); *see also id.* at 568 ("[A]n individual's right to *vote* for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with *votes* of *citizens* living in other parts of the State." (emphasis added)). Indeed, the cases on which Appellants rely—including, most notably, *Larios*—speak in terms of the under-weighting of *votes*. *See, e.g.*, *Larios*, 300 F. Supp. 2d at 1337; *WMCA*, 377 U.S. at 653. (In *Larios*, unlike here, the same region was slightly overpopulated in terms of total population and *more* overpopulated in terms of eligible and enrolled voters. *See* Motion to Affirm at 19, *Cox v. Larios*, No. 03-1413 (filed May 13, 2004).)

Thus, if a plan *enhances* the weight of a "person's" vote relative to other districts, then the person has suffered no cognizable constitutional harm. Equality of total population—the most readily available statistic—is commonly used only as a rough *proxy* for voting equality, and the Court has emphasized that precise equality of total population is not required because, among other reasons, total population is not "a talismanic measure of the weight of a person's vote." *Gaffney*, 412 U.S. at 746; *see also id.* at 746-47 ("The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States."). For example, in *Burns v. Richardson*, 384 U.S. 73 (1966), the Court upheld the use of a plan with *substantial* deviations in total population (Oahu had 79% of Hawaii's population and elected 71% of the state house). *Id.* at 82. These deviations were not problematic because "[t]otal population figures may . . . constitute a substantially distorted reflection of the distribution of state citizenry." *Id.* at 94. And, in terms of citizens and registered voters, there was no substantial inequality. *Id.* at 82, 96.

As this reflects, Appellants' true complaint is not about the voting equality of persons residing in "downstate," but is based on some perceived constitutional right to "proportional representation" of "downstate" Senators in the state legislature—*i.e.*, the percentage of "downstate" Senate seats must be equivalent to the percentage of population in "downstate." The Fourteenth Amendment does not, of course, vest any "region" with any right of proportional representation: "Legislators are elected by voters, not farms, or cities or economic interests." *Reynolds*, 377 U.S. at 562. But even if proportional representation of "cities" or "regions" was within the comprehension of the Fourteenth Amendment, New York City is provided with nearly perfect proportional representation in the Senate and is *over*-represented in the state legislature. As the district court emphasized, New York City would receive 26.2 seats if every district were apportioned with perfect equality, and it receives 26 seats under the 2002 Senate Plan.[8] J.S. 31a-32a. Moreover, when representation in the New York State

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[8] Appellants do not dispute that districts "controlled or predominantly controlled by city-based voters" must be treated as New York City districts for purposes of any proportionality analysis. J.S. 31a-32a. Instead, they claim that "the record contain[s] no evidence whatsoever" to support the district court's treatment of two of the seats as controlled or predominantly controlled by city-based voters. J.S. 19 n.11. On the contrary, it is undisputed that New York City is home to 78% of the residents in these districts. App. 8a-9a. Even more bizarre is Appellants' assertion that "the drafters of the Plan purposefully siphoned 135,000 residents from Westchester" into these two districts. J.S. 19 n.11. Two highly technical memoranda, upon which Appellants exclusively rely, show merely that the drafters faced a choice between the challenged configuration (with about 135,000, or 22%, of these two districts' residents living in Westchester) and alternative configurations in which about 131,000, or 21%, of these two districts' residents would have lived in Westchester. J.S. 277a-278a, 281a-282a. There is no merit to Appellants' apparent assertion that predominant control of these districts shifted out of New York City when they were drawn to be 78% in the City (on average) instead of 79%.

Assembly is considered, as it must be,[9] New York City is *over*-represented in the Legislature as a whole, even in terms of total population.[10] *See supra* p. 4 n.6.

Consequently, the undisputed facts show that there is neither a cognizable "region" nor any disproportionality to support Appellants' claim of "regional discrimination."

B. It is Undisputed That the Challenged Deviations Are Necessary to Comply With Legitimate Redistricting Principles

At bottom, Appellants are left trying to transform a simple statistical *effect*—that certain contiguous districts have more population than others—into a showing that the *purpose* of the population deviations was to create this allegedly adverse effect. As the district court stated, however, "the plaintiffs only beg the question in repeatedly asserting that the pattern of overpopulation and underpopulation 'reflects an illegitimate effort to overrepresent an entire region of the State in order to maintain its ascendancy in the Senate, at the expense of another large region which the 2000 Census data showed had grown much more substantially over the past decade.'" J.S. 30a. The question begged by Appellants' assertion is: Do the population differences between the so-called "regions" stem from regional animus, or were the deviations related to one or more legitimate redistricting principles? In this regard, Appellants seem to think it

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[9] *See Reynolds*, 377 U.S. at 577 (An "apportionment in one house could be arranged so as to balance off minor inequities in the representations of certain areas in the other house."); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) (The "indispensable[] subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral legislature.").

[10] Again, the situation was the opposite in *Larios*, where the disadvantaged region was under-represented in both houses of the legislature. *See* 300 F. Supp. 2d at 1327, 1342.

enough to establish that the deviations were not inadvertent; thus, their repeated refrain that the deviations were "deliberate." J.S. i, 2, 9, 10, 11, 13, 17, 18, 21, 24. The question, of course, is not whether the Plan resulted from a cognitive act, but whether the purpose of that deliberate act is to harm a certain region or to further legitimate principles.

As is clear from the decision below and confirmed by the jurisdictional statement, Appellants do not dispute that the challenged deviations were *required* in order to further at least two redistricting principles approved by this Court as satisfying even the far more stringent requirements for *congressional* districts[11]: "preserving the cores of prior districts, and avoiding contests between incumbent [r]epresentatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).[12]

The plan that Appellants say the Legislature "easily could have drawn" (J.S. 9) would have overpopulated the "upstate" instead of the "downstate" and, in the process, removed an entire district from the "upstate" and transplanted it into the

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[11] *See, e.g., White v. Regester*, 412 U.S. 755, 763 (1973) ("It is plain . . . that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats."); *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983).

[12] It is also undisputed that the slightly greater (albeit minor) deviations in the Queens districts were *required* to keep Queens County whole—that is, to avoid having a district that straddled the Queens County border. *See, e.g., Karcher*, 462 U.S. at 740 ("respecting municipal boundaries" is a legitimate legislative policy); N.Y. Const. art. III, § 4 (articulating state policy of respecting county borders). Appellants have it backwards when (J.S. 23) they cite *Kilgarlin v. Hill*, 386 U.S. 120 (1967), for the proposition that respect for county boundaries is irrelevant, merely because Appellants' revised plan (but not their original plan) preserved one more whole county statewide. *Kilgarlin* makes clear that the preservation of county lines must be "relate[d] [to] . . . specific inequalities among the districts." 386 U.S. at 124. Accordingly, the relevant point is that lower deviations could have been achieved in Queens *only* by crossing the county border.

"downstate," thereby causing the "upstate" to have one fewer district than in the 1990's plan. Obviously, with the same number of incumbents and one fewer district, a contest between incumbents would have been *unavoidable*. The cores of prior districts likewise would have been massively disrupted, by necessity, if a district had been eliminated and the others had been reconfigured to fill the void. The district court correctly relied on these facts in expressly distinguishing *Larios*, where "'core retention was not a concern in the redistricting process,'" and the legislature engaged in "wholesale distortion of district lines throughout the state in order to target and oust members of the minority political party." J.S. 34a n.34 (quoting 300 F. Supp. 2d at 1334).

Appellants do not dispute that, in other cases, deviations as minor as those in the 2002 Senate Plan—and, indeed, many deviations *greater* than 10%—are justified if needed to preserve the cores of prior districts. Appellants nevertheless maintain that preserving the cores of prior districts is not "a legitimate justification for a deliberate effort to nullify Census data." J.S. 24. But *every* plan that deviates from perfect population equality to preserve the cores of prior districts does so precisely to avoid the disruption that would be caused by slavish adherence to the new "Census data" and the resulting creation of new, unfamiliar districts. Thus, *every* departure from perfect population equality to preserve district cores *ipso facto* "nullif[ies] Census data"—to the extent Appellants' pejorative rhetoric is comprehensible at all. Consequently, Appellants' derisive characterization fails to distinguish the legion of cases sanctioning core preservation or to provide a basis for condemning the standard core preservation here.

Indeed, the claim that the challenged plan "nullif[ies] Census data" is especially inappropriate in this case. While preserving the prior districts in the so-called "upstate," the plan reflects the relative population shift from "upstate" to "downstate" by increasing the size of the State Senate from

61 to 62 seats and *adding* the new district to *New York City*. Thus, when confronted with the need to add a district to New York City in order to reflect its population growth, the Legislature chose to create an entirely new district for New York City instead of taking the district from elsewhere in the State, which would have necessitated a contest between incumbents and would have destroyed district cores. Accordingly, the 2002 Senate Plan increases the "downstate" share of Senate seats, commensurate with census figures showing more population growth in that area.

Appellants also concede, as they must, that the slight overpopulation of "upstate" was *required* in order to avoid the incumbent pairing necessitated by the elimination of an "upstate" district, which would have resulted from underpopulating those districts as Appellants proposed. Because the population deviations in "upstate" undisputedly were required in order to avoid an incumbent pair, the 2002 Senate Plan satisfies the very standard proposed by Appellants themselves—*i.e.*, that "a particular objective *required* the specific [population] deviations" at issue. J.S. 24 (quoting *Karcher*, 462 U.S. at 741 (emphasis and alteration added in J.S.)).

Even though avoidance of incumbent pairs indisputably required adoption of the slightly higher deviation alternative and thus satisfied even *Karcher*'s demanding standards, Appellants nonetheless argue that this is somehow not a legitimate justification because the plan as a whole did not achieve *perfection* with respect to the policy of avoiding pairs. That is, avoiding the "upstate" pair was purportedly unjustified because, elsewhere in the State, "two sets of downstate Democratic incumbents were gratuitously paired." J.S. 24. But a plan obviously need not *wholly eliminate* incumbent pairs to rely on that as a legitimate policy justifying deviations, any more than a plan need wholly eliminate divisions of municipalities or counties to invoke that as a justification for slight deviations.

In any event, the undisputed evidence establishes that the Plan minimized incumbent pairs, relative to *all* lower deviation alternatives, to the extent practicable. Appellants' alternative not only resulted in pairing "upstate" incumbents but, overall, had twice as many incumbent pairs as the 2002 Senate Plan, even after Appellants consciously revised the plan in order to minimize incumbent pairs to the extent possible.[13] As the district court noted, "the 2002 New York State Senate Plan has only two incumbent pairings while the Plaintiffs' Revised Plan produces four incumbent pairings." J.S. 29a n.30. Moreover, the only alternative proposed to the *Legislature* for its consideration "paired 20 incumbents, 17 of whom were Republican." J.S. 4a.

As this reflects, there is nothing to Appellants' unsubstantiated assertion that the "downstate" pairs were "gratuitous." To the contrary, *Appellants' own* plan originally paired incumbents in exactly the same areas[14]—presumably because both plans adjusted district lines to create new majority-minority districts. Based on the undisputed evidence, therefore, the challenged plan "reflects a legitimate effort to avoid incumbent pairs." J.S. 29a n.30.

Thus, as the district court correctly noted, this is not remotely like a case, such as *Larios*, where population deviations were used to *create* pairings of 47 incumbents, 37

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[13] The plan attached to Appellants' original complaint paired 14 incumbents. App. 27a. Appellants produced their revised plan, with 8 paired incumbents (J.S. 29a n.30), long after the challenged plan had been enacted and, indeed, almost a year after Appellants filed this case.

[14] *See* App. 27a-28a. In addition, the incumbent pairings in the 2002 Senate Plan do *not* sacrifice the principle of avoiding contests between incumbents because, as Appellants are forced to admit (J.S. 14), the plan left "nearby open seats in both instances," allowing an incumbent to run in the nominally open district. *See* N.Y. Const. art. III, § 7. By comparison, if a district had been removed from the "upstate" to reduce population deviations, there would have been no nearby open seat through which a contest between incumbents could have been avoided.

of whom were Republican. J.S. 29a n.30. (In *Larios*, moreover, the defendants sought to justify the deviations by reference to "incumbency protection" that took the form, not of avoiding incumbent pairs, but of drawing safe districts for Democratic incumbents. 300 F. Supp. 2d at 1329-31.)

In sum, this case involves a state legislature's choice between two types of plans, both with only minor population deviations. The challenged plan's maximum deviation of 9.78% is commensurate with over half of the state legislative plans across the country, and with several *court-ordered* plans, all of which have deviations above 9%. App. 5a-6a. In addition, the Plan's 2.22% average deviation is *lower* than in all but one of the other state legislative plans with greater-than-9% maximum deviations, which means that most state legislative plans have *higher* average deviations than New York's Senate Plan. *Id.* To achieve slightly lower deviations in terms of *total* population, as in Appellants' alternative plan, one necessarily would be providing *less* equality between districts in terms of the weight of individual *votes*, and in terms of overall representation in the bicameral legislature. Adoption of the alternative type of plan also would *require* a contest between incumbents, destruction of the cores of prior districts, and violation of the Queens County border.

In light of these important interests, the enacted plan would plainly be unassailable if the overpopulated districts were scattered among regions. Consequently, Appellants' claim reduces to the absurd proposition that a legitimate plan which serves traditional districting principles somehow becomes improper if the effect falls disproportionately on one "region." Reflecting this confusion, Appellants repeatedly invoke cases making the obvious point that deviations creating stark voting inequality cannot be *justified* on the basis that they were designed to prefer one region. But this does not in any way suggest that a redistricting plan that would be permissible if the overpopulated districts were scattered in a piecemeal fashion among regions somehow

becomes constitutionally impermissible because it happens that the overpopulated districts are grouped in one region. "Regions" have no Fourteenth Amendment rights distinct from the "persons" in them. Thus, a plan that treats persons with sufficient equality to satisfy the Fourteenth Amendment if the overpopulated districts were distant from each other also satisfies the Constitution if the districts are contiguous.

Needless to say, *Larios* did not suggest that regional differences themselves invalidate an otherwise permissible redistricting plan. Instead, *Larios* turned on the fact that the (more significant[15]) deviations in that case, unlike those here, were *not* required to avoid contests between incumbents, to preserve the cores of prior districts, or to comply with any other traditional redistricting principle. In *Larios*, there was "no evidence that the population deviations in the plans were driven by the neutral and consistent application of any traditional redistricting principles." 300 F. Supp. 2d at 1349. Here, there is no evidence that they were driven by anything else.

C. Appellants' Claim That the District Court Applied the Wrong Legal Standard Lacks Merit

In a transparent effort to avoid the undisputed facts of the case, Appellants mischaracterize certain statements by the district court and then claim that the statements articulate an erroneous legal standard. This Court, of course "reviews judgments, not statements in opinions." *Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (internal quotation marks omitted). And here, Appellants cannot prevail under

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[15] Although the total population deviations in *Larios* were under 10%, the average deviations (3.47% and 3.78%) were far higher than in this case (2.22%), the deviations of the two houses of the legislature reinforced rather than offset one another, and the regional disadvantage was *higher* in terms of eligible and enrolled voters, whereas here the weight of votes in the allegedly disadvantaged region is *greater* than in other parts of the State. *See supra* pp. 12-14; 300 F. Supp. 2d at 1326-27.

any conceivable legal standard since the district court found, based on painstaking review, that "the plaintiffs failed to show that the deviation was not caused by the promotion of court-approved state policies," that they had "not produced evidence of irrational or unconstitutionally discriminatory behavior by the Legislature," and that they failed to present even "some evidence that the districting can be traced to impermissible considerations." J.S. 28a, 30a. Indeed, the undisputed facts showed that the 2002 Senate Plan was valid even under the familiar standard for deviations *above* 10%, and Appellants do not suggest that a plan with *lesser* deviations is held to *stricter* standards. Specifically, in this case, it is clear that "the legislature's plan 'may reasonably be said to advance [a] rational state policy.'" *Brown*, 462 U.S. at 843 (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)). Accordingly, questions about whether and to what degree a plan with minor deviations is subject to *more lenient* standards (including whether, contrary to the district court, such plans are immune from one-person, one-vote challenge) are wholly irrelevant.

Even assuming it mattered, there is nothing problematic about the district court's language that Appellants attack. Seeking to erect a cathedral around the word "solely," Appellants claim (J.S. 19) that the court erred in stating: "'[A] plaintiff [can], with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent. To prevail, though, the plaintiffs have the burden of showing that the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy.'" J.S. 24a-25a (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994) (three-judge court) (emphasis added below)). Appellants' selective quotation conveniently omits the lower court's clarification in the next sentence: "Thus, the plaintiffs . . . must demonstrate . . . that the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation. *See Karcher*, 462 U.S. at 740-44." J.S.

25a (quoting *Marylanders* (emphasis added below)). A plaintiff must therefore do more than simply point to "minimal[] devia[tions]" and "scant evidence of ill will by district planners" (J.S. 25a); instead, a plaintiff must show that the impermissible purpose was the actual reason for the challenged deviations.

Contrary to Appellants, therefore, the "ab[ility] to pay lip service to various traditional redistricting objectives" (J.S. 20) will not aid defendants unless those objectives were the actual reason for the deviations at issue. In all events, Appellants' entire discussion has a distinct other-worldly quality because, again, the court clearly found that the challenged plan does far better than "pay lip service" to traditional redistricting principles, and that there was no evidence of regional animus (or any other form of ill will) *at all*.

Moreover, the "sole[]" or "actual reason" standard is no more lenient than that used when a plan's deviations are *over* 10%, such that it is presumptively unconstitutional and must be justified by the state. Again, the question in such cases is whether the plan "*may reasonably be said* to advance [a] rational state policy." *Brown*, 462 U.S. at 843 (emphasis added). Thus, even if the "actual" or "sole" reason motivating the legislature was not a rational state policy, the state would still prevail if, objectively, the plan furthered that policy. Under the district court's standard, in contrast, the state would *lose* if the plan objectively furthered a rational state policy, but the sole or actual reason was illegitimate. The district court's standard is certainly no more *lenient* than that used for presumptively unconstitutional deviations and, of course, there is no basis for applying a more rigorous standard to these minor deviations.

As this reflects, the standard for evaluating population deviations is designed to avoid having the federal judiciary "bogged down in a vast, intractable apportionment slough," *Gaffney*, 412 U.S. at 750, and to avoid an amorphous inquiry

into the "motivation" of a multi-member legislature in the highly partisan redistricting context. *Cf. United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("Inquiries into [legislative] motives or purposes are a hazardous matter."). Appellants' proposed standard inevitably would plunge the judiciary into just this political thicket and require that all state legislative plans achieve perfect population equality. Specifically, Appellants contend that "'*any taint* of arbitrariness'" condemns *any* population deviations and that partisan motivation "cannot be a legitimate reason for deviating under ten percent." J.S. 19, 21-22 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (emphasis added in J.S.)). But, as this Court has noted, "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney*, 412 U.S. at 753, and it is always possible to design a plan with perfect population equality. Thus, virtually every plan is invalid under Appellants' syllogism, since all a plaintiff need do is show "partisan" considerations and propose a plan with lesser deviations. Perfectly legitimate plans, serving valid districting principles that would be acceptable if drawn by a neutral redistricting commission, would be condemned because there was a "taint" of politics in their enactment.

In all events, Appellants' discussion of whether politics justifies population deviations is irrelevant here, because Appellants never provided any evidence that the deviations resulted from partisan concerns and, contrary to Appellants' mischaracterization, the district court nowhere said that partisan concerns would justify the deviations, if that had been offered up as a justification.

Appellants blithely assert that "[t]he district court's opinion was premised on the assumption that so long as the total population deviation remains within ten percent, it is permissible for a legislature to deliberately construct districts of unequal size for the purpose of gaining partisan advantage." J.S. 21. In fact, the district court's *opinion* said no such thing, and its *judgment* certainly was not "premised"

on such reasoning. The court recognized that "politics surely played a role in redistricting in New York in 2002—as it does in most every jurisdiction." J.S. 4a. But Appellees never suggested—and the court never entertained the possibility—that "partisanship *justifies*" the population deviations. J.S. 22 (emphasis in original). Nor did they need to, since the population deviations at issue clearly were justified in light of traditional redistricting considerations *other* than politics.

Appellants themselves, moreover, never introduced partisanship as an issue; they chose to rely instead on allegations of regional disproportionality. Specifically, Appellants never suggested that the deviations somehow reduced Democratic representation, that the overall result of the redistricting was unfair or cognizable under *Davis v. Bandemer*, 478 U.S. 109 (1986), that Democrats and Republicans in the same region were treated differently with respect to population (or anything else), or that district lines were ungainly. In short, Appellants did not present anything analogous to the showing in *Larios*, or anything else to demonstrate that the deviations' purpose and effect was identifiable partisan gain.

Appellants' one feeble effort in this regard was to hold up as a "smoking gun" a memorandum from the 2002 Senate Plan's chief architect. But, as the district court observed, the memorandum actually "assists the defendants at least as much as it assists the plaintiffs because it plainly invokes the permissible policies that *Karcher* contemplates." J.S. 29a. Specifically, the memorandum shows an effort to promote "contiguity, compactness, preserving the cores of existing districts, desiring not to pit incumbents against one another, respecting then-current political subdivisions and county lines, and staying within the ten-percent-deviation parameter of *Brown*." J.S. 28a-29a. "[N]or is it surprising that a memorandum to the Republican State Senat[ors] in control of redistricting would describe a potential Democratic district as comprised of 'undesirable' voters"—who, in any

event, were located in *perfectly* populated (0.03% deviation) districts on *Long Island*, not in "upstate" or "downstate." J.S. 29a-30a.

In this connection, Appellants are either confused or disingenuous about the district court's citation to *Easley v. Cromartie*, 532 U.S. 234 (2001). J.S. 30a. As the court observed, *Cromartie II* established that a mere statistical racial effect (*i.e.*, the mere fact that a plan seems to separate African-American and white voters) does not suffice to show a racial purpose when there is a strong correlation between race and politics. J.S. 30a. Similarly here, the mere fact that "upstate" districts are overpopulated does not suffice to show that the Legislature harbored some "regional" animus against voters based on where they lived. *Id.* ("In New York State, the traditional correlation between 'upstate' districts and Republican political identification (21 out of 24 Senators upstate are Republican) means that the plaintiffs here needed to proffer more than a mere assertion of a Senate conspiracy for 'upstate' ascendancy to meet their burden of showing a violation of the one-person, one-vote principle.").[16] Far from holding that politics justify otherwise impermissible population deviations, the court simply used politics to illustrate why Appellants were unable to prove "regional" discrimination *at all*, much less that such discrimination—instead of any legitimate redistricting principle—was the actual reason for the challenged deviations.

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[16] Nor can Appellants be heard to complain that it is too difficult to prove "regional" discrimination if they are required to show more than the mere existence of regional differences. In light of the strong overlap between race and politics, it is generally *harder* to disentangle politics from race (in order to prove race discrimination) than it is to disentangle politics from alleged "regions." Such disentanglement, however, is clearly necessary to show that race played an impermissible role in redistricting, and even Appellants presumably would not contend that residents of cognizable "regions" receive *greater* protection than racial groups under the Fourteenth Amendment.

Conversely, the fact that there was a correlation between the "upstate" and Republican incumbents does not mean that the Senate Republican majority was precluded from pursuing neutral districting principles which "benefited" that area, or that these legitimate principles became illegitimate because of some political "taint," particularly since there was no identifiable negative effect on any voters or party. Yet, as the district court properly recognized, mindless invalidation of such legitimate plans would be the necessary result of accepting Appellants' theory that even minor deviations supported by neutral redistricting policies somehow become impermissible if they have a beneficial effect on a region or majority party. Establishing a statistical correlation between a party and a region is wholly insufficient to establish an illegitimate purpose or to condemn a plan that plainly advances neutral principles.

In short, since Appellants' case below focused only on alleged "regionalism" instead of politics, their current discussion of the issue—and, relatedly, their reliance on *Larios*—is entirely beside the point. In any event, since Appellants' *entire* "showing" of partisanship consists of the observation that the "upstate" is disproportionately Republican, this case does not provide a vehicle for analyzing the legitimacy of utilizing population deviations as a tool for a cognizable partisan gerrymander.

II. THIS APPEAL DOES NOT PRESENT A LEGISLATIVE PRIVILEGE ISSUE

Appellants also seek plenary review of a series of extraordinarily fact-specific evidentiary rulings on specifically identified documents and witnesses—rulings which were principally based on the idiosyncratic structure of New York State's redistricting task force, and none of which even purport to resolve any question on the scope of legislative privilege. Even if the Court were concerned with such extraordinary minutiae in normal circumstances, the dispositive point here is that the district court never barred a

single deposition of any Senator or legislative aide, and documents were withheld only on the ground that they were irrelevant to the dispute.

Contrary to the jurisdictional statement, the district court did not preclude Appellants from discovery of *any* remotely relevant evidence in this case. With respect to depositions, the district court did not hold that legislative privilege or any other privilege barred the deposition of any witness—including Senator Bruno, other legislators, Mark Burgeson ("the primary drafter of the Plan" (J.S. 10)), or other legislative aides. A perusal of Appellants' appendix confirms that there is no such order and, indeed, reveals the district court's admonition that it was *not* determining the question of "any depositions of legislators or their staffs" and not "determin[ing] whether Senator Bruno, Speaker Silver, and the remaining legislator/defendants are entitled to claim legislative immunity on the facts of this case." J.S. 209a; *see also* J.S. 221a ("It appears that the plaintiffs themselves delayed several fact witness depositions . . . .").

With respect to documents, the district court, over *Appellees'* strenuous objections, ordered the production of *all* requested documents except those that "would add nothing to the discussion of the legality of the Senate majority's final plan." J.S. 214a. Appellants do not and cannot challenge the determination that the protected documents "would add nothing to the discussion." The magistrate identified these documents after careful *in camera* inspection, and Appellants never asked the district court to review the documents or objected to the magistrate's document-specific relevance determinations. Before the district court, Appellants argued only that Senator Bruno had waived legislative privilege and that legislative privilege does not apply to *any* document—regardless of its individual relevance—that "pertains to challenged districts (which could include documents concerning districts adjacent to the

challenged districts)."[17] App. 39a. Accordingly, even if *legislative privilege* does not bar discovery of irrelevant documents, the court's ruling on these documents was correct on relevance grounds alone and, for the same reason, could not possibly have prejudiced Appellants.

In all events, even if the legislative privilege issue were not rendered irrelevant by the irrelevance of the documents themselves, Appellants' arguments lack merit. Appellants contend (J.S. 25-26) that there is never *any* legislative privilege for state legislators. Appellants, however, did not object when the magistrate rejected this argument and held instead that state legislative privilege is governed by a five-part balancing test. They have therefore waived any objection to this standard. Fed. R. Civ. P. 72(a).[18]

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[17] Appellants' one-person, one-vote claim is not district-specific but is based on alleged "regional" discrimination. Thus, Appellants contended only that the withheld documents were needed (regardless of individual relevance) for their Voting Rights Act and Fourteenth Amendment racial gerrymandering claims, none of which is raised in this appeal. App. 38a.

[18] In all events, if legislative privilege does not provide state legislators with complete immunity from discovery in civil actions, it at least protects those matters satisfying the magistrate's five-part test. Contrary to Appellants, the state legislative privilege is "similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 732 (1980); *cf.* N.Y. Const. art. III, § 11 (speech or debate clause nearly identical to federal counterpart). In addition, Appellants' reliance on criminal cases such as *United States v. Gillock*, 445 U.S. 360 (1980), is misplaced. "Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in *criminal* actions, [citing *Gillock*], [this Court] generally ha[s] *equated* the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Supreme Court of Va.*, 446 U.S. at 733 (emphasis added). For legislators at all levels, moreover, the privilege extends to discovery as well as personal liability. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) ("[I]t simply is not consonant with our scheme of government for a court to inquire into the motives of legislators." (internal quotation marks omitted)).

Appellants also argue that the magistrate judge did not "actually perform[] . . . a balancing analysis." J.S. 26. The record is clearly to the contrary (*e.g.*, J.S. 213a-216a), as Appellants previously have *conceded*. App. 29a ("Judge Maas engaged in a sensitive balancing of Senator Bruno's claimed need for secrecy and Plaintiffs' competing need for disclosure."); App. 31a ("Overall, Plaintiffs believe that Judge Maas's privilege rulings fairly and appropriately balanced the parties' competing interests, as he was required to do by the qualified privilege standard that governs this case.").

Appellants also cite *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001), and claim that Senator Bruno "waived" legislative privilege by "willingly participat[ing] in the litigation." J.S. 28. But *Powell*, in which the legislators *intervened*, is precisely the opposite of this case, in which the legislators were *sued* by Appellants.[19]

Finally, Appellants argue that Fed. R. Civ. P. 26(a)(2)(B) and (b)(4)(B) required disclosure of all information known to expert witness Mark Burgeson, including the confidential legislative deliberations of State Senators and their aides. This is an extraordinarily odd argument because, again, the district court did not bar questioning of Mr. Burgeson at any of his *three* depositions or at trial. Appellants were free to ask any questions they desired, and they never sought to compel an answer on the ground that it had not been given or was incomplete. Thus, Appellants' assertion that the designation of Mr. Burgeson as an expert "opened up" a line

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[19] Appellants' appendix includes only one mention by the magistrate of the waiver argument. J.S. 202a-203a. Appellants did not object thereto, and the district court expressly stated that the magistrate had not reached the issue. J.S. 209a n.3. The jurisdictional statement does not identify or provide any other ruling or reasoning of the magistrate on the waiver claim. *See* Sup. Ct. R. 14.1(i), 18.3.

of questioning is a *non sequitur*: No line of questioning had been closed by the district court in the first place.

In all events, the questions that Appellants now say they, in retrospect, should have asked Mr. Burgeson as an expert would have been improper because they were well outside the scope of his expert report.[20] Evidence of individual legislators' *subjective* motivations would be wholly irrelevant to any effort by Appellants to challenge Mr. Burgeson's report, which simply identified and explained undisputed, *objective* facts about the various plans—*e.g.*, population deviations under different measures, county breaks, incumbent pairs, and the degree to which each new district encompassed the same population as a prior district. Indeed, the district court relied upon these undisputed facts themselves, rather than on any conclusions drawn by Mr. Burgeson, and the court's judgment thus would have been the same even if the report had been stricken entirely. Finally, Appellants obtained all relevant memoranda by Mr. Burgeson relating to the Legislature's line drawing, as evidenced by their heavy reliance on these memoranda in their summary judgment papers, at trial, and in their jurisdictional statement.

CONCLUSION

The judgment of the district court should be affirmed.

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[20] The district court did not preclude Appellants from deposing Mr. Burgeson as a *fact* witness on the subjective motivation of legislators in drawing district lines. The court only rejected Appellants' argument (App. 46a-47a) that deposition questioning on the subjective motives of legislators and their aides was within the appropriate scope of *expert* discovery. In addition, Plaintiffs only asked the district court to compel deposition testimony—not the production of documents—pursuant to the expert discovery rules. App. 47a.

Respectfully submitted,

C. DANIEL CHILL
GRAUBARD MILLER
600 Third Avenue
New York, NY 10016
(212) 818-8800

Counsel for Appellee Sheldon Silver, Speaker of the New York State Assembly

IRA J. LIPTON
HOGUET, NEWMAN & REGAL, LLP
10 East 40th Street
New York, NY 10016
(212) 689-8808

Counsel for Appellees George E. Pataki, Governor of New York State, and Mary O. Donohue, Lieutenant Governor of New York State

MICHAEL A. CARVIN
(*Counsel of Record*)
LOUIS K. FISHER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Appellee Joseph L. Bruno, President Pro Tempore *and Majority Leader of the New York State Senate*

October 18, 2004

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EXPERT REPORT OF MARK BURGESON

* * *

Population Equality

New York State has a total population of 18,976,457. Based on a 62-seat Senate, the ideal size of a Senate district is 306,072. The overall deviation for the 2002 Senate plan is 9.78%. The average deviation of the 2002 Senate plan is 2.2%. Each and every single district in the 2002 Senate plan is within a 5.0% deviation of the ideal. [See appendix 1.] Under the traditional standards of redistricting, these deviations fall within acceptable standards.

Based on information I have reviewed regarding other redistricting plans, the population deviations of the 2002 Senate plan are well within the normal range for New York State and nationwide. As a comparison, the New York State Assembly plan has an overall deviation of 9.43% and has an average deviation of 2.67%. [See appendix 2.] A check of the National Conference of State Legislatures' (NCSL)website: http://www.ncsl.org/programs/legman/redistrict/redistpopdev.htm) indicates that there are 24 states whose upper legislative house's overall deviation exceeds 9%, and 25 states whose lower legislative house's overall deviation exceeds 9%. [See appendix 3.] I have been provided with population summaries for two additional upper house plans and three additional lower house plans with deviations exceeding 9%. [See appendix 4.] With more than half of the state legislative houses having total deviations above 9%, the total deviation of the 2002 Senate plan can hardly be described as unusual.

I have also been provided with the average deviations for each of the state plans with greater than 9% total deviation. [See appendix 5.] Review of this information shows that only one of the 54 plans has a lower average deviation than the 2002 New York Senate plan. The average

Demographic Table - Revis

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Idea Populatio
Plaintiffs' Dist. 01	306020	-52
Plaintiffs' Dist. 02	306020	-52
Plaintiffs' Dist. 03	306020	-52
Plaintiffs' Dist. 04	306020	-52
Plaintiffs' Dist. 05	305966	-106
Plaintiffs' Dist. 06	305966	-106
Plaintiffs' Dist. 07	305967	-105
Plaintiffs' Dist. 08	305967	-105
Plaintiffs' Dist. 09	305967	-105
Plaintiffs' Dist. 10	302270	-3802
Plaintiffs' Dist. 11	302270	-3802
Plaintiffs' Dist. 12	302269	-3803
Plaintiffs' Dist. 13	302269	-3803
Plaintiffs' Dist. 14	302270	-3802
Plaintiffs' Dist. 15	302270	-3802

ed Plaintiffs' Senate Plan

n al on	Deviation Percentage	[Additional Columns Omitted]
	-0.02%	
	-0.02%	
	-0.02%	
	-0.02%	
	-0.03%	
	-0.03%	
	-0.03%	
	-0.03%	
	-0.03%	
	-1.24%	
	-1.24%	
	-1.24%	
	-1.24%	
	-1.24%	
	-1.24%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 16	302269	-3803	-1.24%	
Plaintiffs' Dist. 17	302270	-3802	-1.24%	
Plaintiffs' Dist. 18	302270	-3802	-1.24%	
Plaintiffs' Dist. 19	302270	-3802	-1.24%	
Plaintiffs' Dist. 20	302270	-3802	-1.24%	
Plaintiffs' Dist. 21	302269	-3803	-1.24%	
Plaintiffs' Dist. 22	302270	-3802	-1.24%	
Plaintiffs' Dist. 23	302269	-3803	-1.24%	
Plaintiffs' Dist. 24	302269	-3803	-1.24%	
Plaintiffs' Dist. 25	302271	-3801	-1.24%	
Plaintiffs' Dist. 26	302270	-3802	-1.24%	
Plaintiffs' Dist. 27	302270	-3802	-1.24%	
Plaintiffs' Dist. 28	302270	-3802	-1.24%	
Plaintiffs' Dist. 29	302270	-3802	-1.24%	
Plaintiffs' Dist. 30	302271	-3801	-1.24%	
Plaintiffs' Dist. 31	302271	-3801	-1.24%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 32	302270	-3802	-1.24%	
Plaintiffs' Dist. 33	302270	-3802	-1.24%	
Plaintiffs' Dist. 34	302269	-3803	-1.24%	
Plaintiffs' Dist. 35	302270	-3802	-1.24%	
Plaintiffs' Dist. 36	302271	-3801	-1.24%	
Plaintiffs' Dist. 37	302269	-3803	-1.24%	
Plaintiffs' Dist. 38	302270	-3802	-1.24%	
Plaintiffs' Dist. 39	312031	5959	1.95%	
Plaintiffs' Dist. 40	306218	146	0.05%	
Plaintiffs' Dist. 41	311538	5466	1.79%	
Plaintiffs' Dist. 42	309961	3889	1.27%	
Plaintiffs' Dist. 43	316361	10289	3.36%	
Plaintiffs' Dist. 44	314862	8790	2.87%	
Plaintiffs' Dist. 45	316334	10262	3.35%	
Plaintiffs' Dist. 46	309725	3653	1.19%	
Plaintiffs' Dist. 47	316644	10572	3.45%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 48	301747	-4325	-1.41%	
Plaintiffs' Dist. 49	315934	9862	3.22%	
Plaintiffs' Dist. 50	316661	10589	3.46%	
Plaintiffs' Dist. 51	303721	-2351	-0.77%	
Plaintiffs' Dist. 52	316662	10590	3.46%	
Plaintiffs' Dist. 53	316481	10409	3.40%	
Plaintiffs' Dist. 54	302684	-3388	-1.11%	
Plaintiffs' Dist. 55	302683	-3389	-1.11%	
Plaintiffs' Dist. 56	315692	9620	3.14%	
Plaintiffs' Dist. 57	315623	9551	3.12%	
Plaintiffs' Dist. 58	305002	-1070	-0.35%	
Plaintiffs' Dist. 59	307538	1466	0.48%	
Plaintiffs' Dist. 60	307538	1466	0.48%	
Plaintiffs' Dist. 61	307539	1467	0.48%	
Plaintiffs' Dist. 62	307539	1467	0.48%	

of the average deviations in these plans is 3.03% for the lower houses and 2.93% for the upper houses, well in excess of the 2.22% average deviation for the 2002 New York Senate plan. Significantly, among the plans with comparable or greater deviations than the 2002 Senate plan are plans ordered into place by federal courts in Texas and New Mexico. New Mexico's two plans have overall deviations of 9.6% and 9.7%, and average deviations of 2.83% and 2.73%. For the Texas house, those figures are 9.74% total deviation and 2.65% average deviation. [See appendix 6.] It is my understanding that Dr. Beveridge did not consider the 2002 Assembly plan, plans ordered by other courts, nor other plans in other states. [Deposition transcript ("Tr.") at 126-29.] He did acknowledge, however, that the total and average deviations of the 2002 Senate plan do not violate equal population principles. [Tr. at 144.]

It has been noted that the slightly overpopulated districts in the 2002 Senate plan are districts 10-38, and that this pattern cannot reasonably be due to random chance. In my experience, the numerous legal requirements and other traditional principles of redistricting will never result in a plan coming together in a random manner. With respect to population equality, I have never understood equality to mean that overpopulated districts must be scattered throughout the state, rather than adjacent to one another.

In my experience, there have been many instances of large groupings of adjacent districts that are either overpopulated or underpopulated. For example, in the 1992 Senate plan, districts 1 through 9 were all underpopulated and districts 10 through 36 were all overpopulated. [See appendix 7.] Similarly, in the 2002 Assembly plan, districts 1 through 21 are all overpopulated and districts 22 through 63 are all underpopulated. [See appendix 2.] And, all the other Senate plans submitted by plaintiffs and/or the Senate Minority underpopulate districts 10 through 38, and two of

those plans overpopulate districts 39-62. [See appendix 8.] As Dr. Beveridge acknowledges [Tr. at 137], this type of pattern in other plans is just as unlikely to happen at random as the pattern in the 2002 Senate plan.

These patterns are almost always due to the "block-on-border" rule. Under the block on border rule in New York's Constitution, the difference in population between two adjacent districts within a county may not be greater than the population of any block on the border. In other words, if two adjacent districts could be made more equal in population by shifting a block on the border from one district to the other, then the rule generally requires that the shift be made. Since it is almost always possible to find blocks of very small populations on the border, the result of this rule is that those two districts will almost always be nearly identical in population. Alterations made to any one of those two districts, moreover, will result in a "ripple effect".

The "ripple effect" refers to adjustments, which are required to other districts when adjustments are made to one or more specific districts. That is, when a change is made to one particular district, that change will almost certainly mandate change to adjacent districts, and then to those adjacent, and so on throughout the entire area. Thus, equality of districts in urban areas can be shown to be the result of "block-on-border" and the "ripple effect", not random chance.

I understand that much of the complaint regarding the 2002 Senate plan revolves around the claim that "downstate" has disproportionate representation. I am not aware of any redistricting principle that makes disproportionality among regions relevant when the deviations between individual districts are small. As we have just seen, redistricting plans in New York typically include regions that are either overpopulated or underpopulated. I also understand that the 2002 Senate plan is being criticized for improper

mathematical "rounding down" of the number of "downstate" Senate districts by a fraction, instead of "rounding up" by a fraction as the Revised Plaintiffs' plan does. Again, I am not familiar with any redistricting principle that focuses on trivial differences among "regions".

If one were to engage in an analysis of different geographic regions, New York State could be broken down into three main geographic regions: Long Island (Nassau and Suffolk counties), New York City (the five New York City counties of Bronx, New York, Kings, Richmond and Queens), and "upstate" (the 55 counties north and west of the Bronx/Westchester county line). As shown in table 1, based on a strict, mathematically-equal apportionment (dividing the region's population by the ideal Senate district size – 306,072), Long Island would be allotted 8.9 Senate districts, New York City would be allotted 26.2 Senate districts and "upstate" would be allotted 26.8 Senate districts.

Table 1.

Region	Population	Pop/Ideal Size	SD Ratios
Long Island	2,753,913	2,753,913/306,072	8.9
New York City	8,008,278	8,008,278/306,072	26.2
Upstate	8,214,266	8,214,266/306,072	26.8

The 2002 Senate plan apportioned Senate districts, based on the above numbers, as follows:

Table 2a.

Region	Ratios	SD's
Long Island	8.9	9
New York City	26.2	26
Upstate	26.8	27

As table 2a shows, the 2002 Senate plan properly apportions control of the appropriate number of Senate districts consistent with the regions' population. There are

two Senate districts (34 and 36), which extend into "upstate" Westchester (total population of both districts in Westchester is 135,033). I agree with Dr. Beveridge that the representatives of such districts can be expected to vigorously represent New York City interests [Tr. at 96-97], such that New York City residents have 26 advocates in the Senate. If the portions extending into Westchester are nevertheless included in the "upstate" numbers, the chart is as follows:

Table 2b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	25.6	+2.2%
Upstate	26.8	27.4	- 2.1%

Comparable tables for the Revised Plaintiffs' plan are contained in tables 3a and 3b.

Table 3a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	27	- 3.1%
Upstate	26.8	26	+3.2%

The two Bronx/Westchester districts in the Revised Plaintiffs' plan are 35 and 36. Table 3b shows the data if the Westchester portions of these districts are included "upstate".

Table 3b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	26.5	- 1.3%
Upstate	26.8	26.5	+1.3%

Thus, in contrast to the 2002 Senate plan, the Revised Plaintiffs' plan gives New York City control of 27 districts where a more proportional apportionment would give New York City control of 26 districts, more in line with the population of the region. In looking at both plans, the differences between plans are fractional. In other words, the Revised Plaintiffs' plan underpopulates the New York City region by a fraction of a district, whereas the 2002 Senate plan overpopulates the same region by a fraction of a district.

If, as Special Master Lacey and Prof. Grofman stated in the hearing before this same Federal panel [May 20, 2002 Tr. at 6, 56], the crucial divide between "upstate" and "downstate" is the Bronx/Westchester line, a slightly different average deviation occurs. Looking at Long Island and New York City as a whole then, one would see that that region would be strictly apportioned 35.2 districts, is allotted 34.6 districts and controls 35 districts under the 2002 Senate plan, as shown in the following table.

Table 4a.

Region	Ratios	SD's	Avg. Dev.
LI/NYC	35.2	34.6	+1.6%
Upstate	26.8	27.4	- 2.1%

And the Revised Plaintiffs' plan.

Table 4b.

Region	Ratios	SD's	Avg. Dev.
LI/NYC	35.2	35.5	- 1.0%
Upstate	26.8	26.5	+1.3%

Again, as above, in contrast to the 2002 Senate plan, the Revised Plaintiffs' plan gives LI/NYC control of 36 districts where a more proportional apportionment would give LI/NYC control of 35 districts, more in line with the population of the region. In looking at both plans, the

differences between plans are fractional. In other words, the Revised Plaintiffs' plan underpopulates the LI/NYC region by a fraction of a district, whereas the 2002 Senate plan overpopulates the same region by a fraction of a district.

As stated above, to the extent that there is any vague definition of "upstate", Westchester is generally considered an "upstate" county, but for argument's sake, following is a table showing the ratios if Westchester is included with New York City.

Table 5a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City/ Westchester	29.2	28.6	+2.0%
Upstate	23.8	24.4	- 2.4%

And the Revised Plaintiffs' plan.

Table 5b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City/ Westchester	29.2	29.5	- 1.1%
Upstate	23.8	23.5	+1.4%

Here again, the 2002 Senate plan overpopulates this region by a fraction of a district, whereas the Revised Plaintiffs' plan underpopulates the region by a fraction of a district. In addition, the New York City/Westchester region under the 2002 Senate plan controls 29 Senate districts, which is more proportionate to its population than the Revised Plaintiffs' plan, which gives the region control of 30 Senate districts.

The most far-fetched definition of "downstate" I have seen includes half of Westchester, Rockland and two towns in Orange County. In my experience, this is the first time the Orange County towns of Warwick and Tuxedo are alleged to have more in common with Brooklyn than with their neighboring Orange County towns of Minisink or Wawayanda. Similarly, I agree with Dr. Beveridge that Ossining (included in "downstate" under this definition) has less in common with New York City than Ossining has with Mount Kisco (included in "upstate" under this definition). [Tr. at 101-02.] The pertinent data for that definition of "downstate" is nevertheless shown in tables 6a and 6b.

Table 6a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	30.2	29.6	+2.1%
Upstate	22.9	23.4	- 2.7%

And the Revised Plaintiffs' plan.

Table 6b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	30.2	30.5	- 0.9%
Upstate	22.9	22.5	+1.2%

No matter how the regions are defined, the 2002 Senate plan slightly underpopulates "upstate" Senate districts and slightly overpopulates New York City Senate districts, and the Revised Plaintiffs' plan overpopulates "upstate" Senate districts and underpopulates New York City Senate districts. Both plans apportion nine districts to Long Island. As I stated above, I have never known it to be significant whether a plan results in underpopulation or overpopulation of a region by a fraction of a district. I certainly know of no basis for concluding that underpopulation or overpopulation

by 0.6 districts is unacceptable, while underpopulation or overpopulation by 0.4 districts is acceptable.

Since I agree with Dr. Beveridge that neither plan provides New York City with perfect proportionality [Tr. at 69], I have examined whether overpopulating rather than underpopulating New York City districts has an effect on compliance with legitimate redistricting principles. In looking at the enacted plan, one can determine numerous legitimate advantages to overpopulating, rather than underpopulating, the New York City Senate districts:

1. First of all, by slightly overpopulating New York City Senate districts rather than underpopulating New York City (as the Revised Plaintiffs' plan does), the 2002 Senate plan provides almost perfect proportionality in terms of the number of Senate districts entitled to the city and the number of districts controlled by the city. That is, there are 24 Senate districts wholly in New York City and two whose overwhelming majority lie in Bronx County, thus allowing the city to control 26 districts, an almost perfect proportionality. By contrast, the Revised Plaintiffs' plan, which allots 27 districts to the region, is not proportional.

2. In addition, by slightly overpopulating the New York City Senate districts rather than underpopulating them, the 2002 Senate plan creates a much greater proportionality in terms of the number of people eligible to vote, the number of people enrolled to vote and the number of people who actually vote. Although not an attorney, I understand that the equal population principle is commonly known as "one person, one *vote*".

An accurate method of measuring voting strength as per "one person, one vote" is using eligible voters; that is, the voting age citizen population. I understand that Dr. Beveridge has sought to adjust for prison population on the theory that, for equal population purposes, representatives

should not be "given the benefit of people who can't vote." [Tr. at 296.] But Dr. Beveridge did not look at the number of eligible voters or relative voting rates, so he is unable to say that the votes of voters in "downstate" districts are worth less than the votes of voters in "upstate" districts. [Tr. at 159-60.]

Using Dr. Beveridge's table 27, New York State has a citizen voting age population of 12,513,359. [See appendix 9.] Using the same method as used to calculate the ideal Senate district size (total state population divided by 62) to calculate the average citizen population results in an average citizen voting age population per Senate district of 201,828 (12,513,359/62). A table showing the average citizen voting population per Region and average deviations from the average citizen population of the 2002 Senate plan is as follows:

Table 8a.

Region	Avg. Citizen 18+ Pop.	Avg. Dev.
Long Island	210,911	+4.5%
New York City	184,518	- 8.6%
Upstate	215,470	+6.8%

This table reveals a substantial shift in the deviations from the average citizen voting age populations per Senate district. To emphasize, the average New York City Senate districts in the 2002 Senate plan are *underpopulated* according to citizen voting age population on an average of 8.6%. [Note: Dr. Beveridge's data do not break out by county within district, so the Westchester portion of the 34th and 36th are included in the New York City numbers. If those data were available, the averages would be altered slightly, not significantly. This note applies to tables 8, 9 and 10.] Long Island and "upstate" are overpopulated according to citizen voting age population by 4.5% and 6.8% respectively.

By underpopulating the New York City Senate districts, the Revised Plaintiffs' plan, by necessity, would further increase the negative 18+ citizen deviation for New York City districts and increase the deviation "upstate". This is illustrated in Table 8b, which is taken from Dr. Beveridge's report table 28. [See appendix 10.]

Table 8b.

Region	Avg. Citizen 18+ Pop.	Avg. Dev.
Long Island	210,911	+4.5%
New York City	177,573	-12.0%
Upstate	223,872	+15.4%

These patterns are even more starkly evident when examining voter enrollment and actual voter turnout. Appendices 11 to 12 contain SAS (Statistical Analysis Software from The SAS Institute) files generated by the Task Force's Redistricting application for the 2002 Senate plan and the Revised Plaintiffs' plan, respectively. These files contain enrollment data by Senate district for 1996, 1998 and 2000. There are also files containing statewide election results by Senate district for the 1996 and 2000 presidential elections and the 1998 gubernatorial election. There are three files containing votes cast for state Senate in 1996, 1998 and 2000 by new Senate district. From these files are culled data to examine the average potential voter participation (enrollment) by Senate district for each geographic region. Again, the same methodology is used to calculate the overall statewide average enrollment/votes per Senate district and then to calculate the average enrollment/votes per Senate district in each region and the deviation from the statewide average. Table 9a illustrates the statewide enrollment/votes averages.

Table 9a.

Year	Enrollment	President/Governor	St. Senate*
2000	154,840	112,477	85,432
1998	153,269	80,406	64,786
1996	144,837	103,835	83,035

*Because of the fact that there is voter falloff going down the ballot, differences in Senate district lines, as well as many uncontested races, the State Senate numbers are calculated using the total votes cast minus the Blank/Void/Missing vote.

Table 9b illustrates the average enrollment/votes under the 2002 Senate plan for each geographic Region and year.

Table 9b.

Year	Long Island	New York City	Upstate
2000			
Enr	177,731 (14.8%)	132,814 (-14.2%)	168,420 (8.8%)
Pres	130,488 (16.0%)	89,827 (-20.1%)	128,284 (14.1%)
St.Sen	107,384 (25.7%)	66,471 (-22.2%)	96,375 (12.8%)
1998			
Enr	167,561 (9.3%)	132,077 (-13.8%)	168,912 (10.2%)
Gov	90,237 (12.2%)	60,488 (-24.8%)	96,310 (19.8%)
St.Sen	79,175 (22.2%)	46,313 (-28.5%)	77,778 (20.1%)
1996			
Enr	156,342 (7.9%)	126,700 (-12.5%)	158,466 (9.4%)
Pres	118,180 (13.8%)	79,899 (-23.1%)	122,103 (17.6%)
St.Sen	101,048 (21.7%)	56,439 (-32.0%)	102,641 (23.6%)

This table clearly illustrates that, in terms of the relative value of potential votes and actual votes cast, the 2002 Senate plan results in greater vote value (i.e. underpopulates) for the New York City Senate districts and lesser vote value (i.e. overpopulates) for the Long Island and "upstate" districts. In other words, one vote cast in the 2000 Presidential election in a New York City Senate district is

the equivalent of .69 votes in a district on Long Island and .70 votes in a district "upstate".

Table 10 illustrates the average enrollment/votes per region for the three years, and the deviation from the statewide average for the Revised Plaintiffs' plan.

Table 10.

Year	Long Island	New York City	Upstate
2000			
Enr	177,731 (14.8%)	127,492 (-17.7%)	175,317 (13.2%)
Pres	130,488 (16.0%)	86,051 (-23.5%)	133,685 (18.9%)
St.Sen	107,384 (25.7%)	63,565 (-25.6%)	100,543 (17.7%)
1998			
Enr	167,561 (9.3%)	126,802 (-17.3%)	175,806 (14.7%)
Gov	90,237 (12.2%)	57,889 (-28.0%)	100,387 (24.9%)
St.Sen	79,175 (22.2%)	44,254 (-31.7%)	81,126 (25.2%)
1996			
Enr	156,342 (7.9%)	121,625 (-16.0%)	164,958 (13.9%)
Pres	118,180 (13.8%)	76,532 (-26.3%)	127,223 (22.5%)
St.Sen	101,048 (21.7%)	53,978 (-35.0%)	106,974 (28.8%)

By underpopulating the New York City Senate districts and overpopulating the "upstate" Senate districts, the Revised Plaintiffs' plan even further exacerbates the inequity between the New York City Senate districts and the "upstate" Senate districts in terms of voter enrollment and actual voter turnout. In other words, one vote cast in the 2000 Presidential election in a New York City Senate district is the equivalent of .66 votes in a district on Long Island and .64 votes in a district "upstate".

3. The 2002 population of Queens County is 2,229,379, and is thus entitled to 7.28 ratios (mathematically ideal district sizes). Seven whole districts within Queens results in a district population of 318,483, which has a deviation from the ideal of 12,411, or 4.05%. Six districts or

eight districts drawn wholly within Queens would exceed acceptable deviations: 21.39% and 8.95%, respectively. In the 2002 Senate plan, seven districts are drawn wholly within Queens, and the remaining 19 New York City districts are overpopulated by a minimal 1.69%. The "Composite" plan in Dr. Beveridge's report, table 23, has seven districts drawn wholly within Queens, and the remaining 20 New York City districts are underpopulated by 2.93%. Thus, another advantage of the 2002 Senate plan in the relatively slight overpopulation of the New York City Senate districts is that it allows the county of Queens to remain whole and, at the same time, keeps the remaining New York City districts under 2% deviation. By underpopulating the New York City region, as Plaintiffs seek to do, the choice must be made to either keep Queens whole and approach a 3% deviation for the remainder of the New York City districts (as under the "Composite" plan), or sacrifice the Queens county line (as under the Revised Plaintiffs' plan).

4. Another advantage to the slight overpopulation of New York City Senate districts and the slight underpopulation of the "upstate" Senate districts in the 2002 Senate plan is that it achieves a balance with the 2002 Assembly plan, which underpopulates the New York City Assembly districts and overpopulates the Long Island and "upstate" Assembly districts. The Assembly apportionment is as follows [see appendix 2]:

Table 11.

Region	Ratios	SD's	Avg. Dev.
Long Island	21.8	21	+3.7%
New York City	63.3	65	- 2.6%
Upstate	64.9	64	+1.5%

In light of the underpopulation of the New York City Assembly districts, underpopulation of New York City

Senate districts would have increased the overall "upstate"/"downstate" deviations in the legislature as a whole. An examination of these numbers reveals that a balance of sorts has been achieved when looking at the legislative plan as a whole: the 2002 Senate plan has slightly increased representation (over a strict, mathematically equal apportionment) of "upstate" New York and slightly decreased representation of New York City, and Long Island is almost perfectly apportioned; while the 2002 Assembly plan, to a slightly greater degree, has increased representation on New York City, and decreased representation of Long Island and "upstate".

Taken as a whole, the combined state legislative balance as enacted is as follows:

Table 12a.

Region	Pop. Pct.	Representative Pct.
Long Island	14.5%	14.2% (30/212)
New York City	42.2%	42.7% (90.6/212)
Upstate	43.3%	43.1% (91.4/212)

This shows a slightly *greater* representation percentage for New York City than warranted under strict mathematical precision and a slight underrepresentation for Long Island and "upstate". Table 12b illustrates the same calculations using the Revised Plaintiffs' plan.

Table 12b.

Region	Pop. Pct.	Representative Pct.
Long Island	14.5%	14.2% (30/212)
New York City	42.2%	43.2% (91.5/212)
Upstate	43.3%	42.7% (90.5/212)

Therefore, in terms of total representation in both houses of the New York State Legislature, both the 2002 Senate plan and the Revised Plaintiffs' plan overrepresent

the New York City area. This overrepresentation is greater in the Revised Plaintiffs' plan.

5. Another advantage in the relatively slight underpopulation of "upstate" districts is the fact that by having slightly less population, the geographic size of the districts is also smaller. Generally speaking, this will presumably result in more effective representation, as senators would require less traveling to meet with constituents throughout the district. Under the 2002 Senate plan, the average area of an "upstate" Senate district is 1,765 square miles. By contrast, the average area of an "upstate" Senate district under the Revised Plaintiffs' plan is 1,823 square miles. [See appendix 13.]

6. Yet another advantage of underpopulating rather than overpopulating the "upstate" area is that it serves the neutral principle of avoiding incumbent pairs. The 2002 Senate plan increases the size of the Senate from 61 to 62 seats and adds the new district to New York City. As a result, even with the slight overpopulation of New York City districts, the city has one more district than in the 1990's. Therefore, the overpopulation of New York City districts does not inevitably result in the pairing of incumbents.

By contrast, as acknowledged by Dr. Beveridge [Tr. at 260], an "upstate" incumbent pairing is the inevitable result of underpopulating rather than overpopulating the New York City Senate districts. By overpopulating the "upstate" districts, the Revised Plaintiffs' plan provides "upstate" with one fewer district than in the 1990's, which requires the pairing of at least two "upstate" incumbent Senators. Therefore, serving the important redistricting principle of avoiding incumbent pairs is another advantage of the slight overpopulation of the New York City districts and the slight underpopulation of the "upstate" districts in the 2002 Senate plan.

7. Similarly, by retaining the same number of "upstate" districts as in the 1990's, the 2002 Senate plan better preserves the cores and configurations of existing districts. As discussed below, this was the primary redistricting principle, after compliance with federal law, followed by Prof. Grofman and Special Master Lacey in drawing the Court's Congressional plan.

Appendices 14 and 15 contain "migration" reports generated by the Task Force's Redistricting application for the 2002 Senate plan and the Revised Plaintiffs' plan, respectively. They measure the percentage of an "old" (1992 SD) district that is within a newly drawn district, and the percentage of the new district that is made up of population from the old district. (Appendix 16 contains similar reports showing the overlap between the 2002 Senate plan and the Revised Plaintiffs' plan.) For example, in the 2002 Senate plan, the newly drawn 6th Senate district contains 97.3% of the population of the "old" 6th Senate district, and 98.9% percent of the new district 6 is made up of population from the "old" district 6.

Table 13 summarizes the migration reports showing the degree of preservation of existing districts for the 2002 Senate plan and the Revised Plaintiffs' plan "upstate".

Table 13.

Percentage of Population of 1992 Senate Districts contained in the most equivalent district in the newly drawn plans

SD	2002 Sen. Plan	Rev. Plain. Plan
35	84.3%	
37	87.7%	74.6%
38	100 %	57.5%
39	100 %	93.0%
40	98.5%	91.6%
41	100 %	77.2%
42	90.4%	59.2%
43	99.9%	60.8%
44	97.9%	93.6%
45	100 %	69.8%
46	100 %	82.9%
47	90.2%	59.2%
48	98.6%	57.1%
49	86.5%	44.9%
50	98.6%	40.8%
51	76.7%	92.3%
52	96.0%	66.9%
53	83.9%	55.5%
54	95.5%	83.0%
55	92.2%	91.6%
56	88.7%	29.5%
57	97.2%	70.4%
58	70.3%	73.4%
59	82.5%	74.5%
60	80.0%	59.7%
61	100 %	85.1%
62	94.5%	99.9%
AVG	92.2%	70.9%

Accordingly, from the calculations above, under the 2002 Senate plan, with an "upstate" average district size of 299,231, this means, on average, 23,340 people will have different representation in the State Senate than they did in

the 1990's. In the Revised Plaintiffs' plan, that number, based on an average "upstate" district size of 310,048, would rise to an average of 90,224. In "upstate", the Revised Plaintiffs' plan moves almost four times as many people to new districts.

In rearranging the "upstate" districts, due in part to the overpopulation of that area, the Revised Plaintiffs' plan is inconsistent with other principles in addition to preserving the cores of existing districts. Another ancillary principle is the preservation of certain geographical characteristics of Senate districts (e.g. maintaining southern tier districts, a north country district, etc.). One important geographical feature, one that Prof. Grofman mentioned in his affidavit, is the Hudson River. [See appendix 17, paragraph 49e.] The 2002 Senate plan maintains that historical boundary intact south of Saratoga County (where population requirements mandate combinations of towns/counties). [See appendix 18.] The Revised Plaintiffs' plan crosses the Hudson River three times south of Saratoga County. [See appendix 19.]

* * *

Finally, in assessing the advantages of a slight overpopulation rather than underpopulation of the New York City Senate districts, it is important to consider the viability of plans submitted to the Task Force for the Legislature's consideration, especially those which illustrated the underpopulation of New York City Senate Districts versus the overpopulation of "upstate" Senate districts. The public record shows that no such plans for a 62 seat Senate were submitted for consideration until one day before the scheduled redistricting vote. And even when submitting this plan to the Task Force on the day before the scheduled vote, Senator Dollinger made it clear that he was "not submitting this plan as a proposal for the Task Force to consider and adopt" but rather as "a legal benchmark" for the record. [See appendix 20.]

Upon review of this plan, it is clear that there were numerous gratuitous incumbent pairings. Appendix 21 contains reports showing incumbent pairs generated by the Task Force's redistricting application. It is a practical flaw for a plan to have excessive incumbent pairings. For example, Special Master Lacey rejected certain Congressional proposals primarily due to the "lack of political fairness" in the nature of two incumbent pairs that were made necessary by the loss of two districts. [See appendix 22 at 8-9.] The plan submitted by Senator Dollinger at the last minute, however, clearly would have resulted in Democratic partisan advantage by pairing incumbents. The plan paired six of the nine Republican senators on Long Island: Lack/Marcellino, Balboni/Hannon and Skelos/Fuschillo; four "upstate" Republican senators: Rath/Volker and Nozzolio/Hoffmann; in addition, three sets of R/D senators (Onorato/Maltese, Gentile/Marchi and Velella/Gonzalez).

Obviously, in the 10 R/R matchups, five Republican members would be eliminated. Appendix 23 contains SAS reports showing party enrollment and the results of 2000 Presidential election, the 1998 Gubernatorial election and the 1996 Presidential election for each district in the Dollinger 62 seat plan. Similar reports for the enacted plan and the Revised Plaintiffs' plan are contained in appendices 24 and 25, respectively. In the R/D matchups, Democratic incumbent Onorato would clearly defeat Republican Maltese in a district in which Al Gore outpolled George Bush in the 2000 presidential election by 63.0% to 26.7% and where Bill Clinton outpolled Bob Dole in the 1996 presidential election by 63.7% to 25.6%. Similarly, incumbent Democrat Gentile would defeat Marchi in a district where Marchi has previously represented about 29.4% of the district to approximately 67.4% for Gentile, and in which Clinton outpolled Dole 54.6% to 34.4% and Gore outpolled Bush 56.8% to 36.5%. [Appendix 26 contains the migration

reports for the Dollinger 62 seat plan.] Finally, Velella would clearly lose to Gonzalez, an Hispanic Democrat incumbent, in a district which is approximately 59.2% of Gonzalez' existing constituency and only 15.5% percent of Velella's existing constituency, is 55% Hispanic, and has typically voted heavily Democratic in the past (Clinton 84.7%, Gore 84.3%; even a popular Republican incumbent governor, George Pataki, was outpolled by Peter Vallone in this district 63.5% to 17.6% in the 1998 gubernatorial election). The Senate Minority's last-minute plan would have resulted in a loss of eight Republican senators from the pairings alone. As Prof. Grofman observed in his report to the Special Master, even a much more limited pairing of incumbents can be "a key indicator" of "a partisan gerrymander" (point 29). The partisan unfairness of the Senate Minority plan is unmistakable.

Significantly, the plaintiffs apparently saw the same thing, as they reduced the number of incumbent pairing in their Revised Senate plan to four: Lack/Marcellino, Hevesi/Maltese, Velella/Gonzalez and Volker/Stachowski. Lack/Marcellino and Velella/Gonzalez are discussed above. Hevesi/Maltese are matched in a district in which Clinton outpolled Dole in the 1996 presidential election by 64.2% to 26.2% and Gore outpolled Bush in the 2000 presidential election by 66.5% to 27.0%. In the case of Volker/Stachowski, they are matched in a district in which Clinton outpolled Dole 53.8% to 30.6% and Gore outpolled Bush by 56.3% to 36.4%. As discussed above, Dr. Beveridge characterized these pairings as inevitable; thus demonstrating that the Revised Plaintiffs' plan is "inevitably" worse than the 2002 Senate plan concerning the neutral principle of avoiding incumbent pairs. In any event, this plan was presented neither to the Task Force nor the Legislature, and was first disclosed in litigation after the Legislature had enacted its 2002 plan. Again, the only alternative 62 seat plan was submitted by Senator Dollinger,

as mentioned above. Even if submitted in a timely fashion, a plan that eliminates eight members of the majority cannot be expected to receive serious consideration in the redistricting process.

* * *

Dated: September 12, 2003

* * *

SUPPLEMENTAL STIPULATIONS OF UNDISPUTED FACTS

WHEREAS by Order dated October 20, 2003, the Court ordered all parties to submit a stipulation of agreed facts; and

WHEREAS the parties have submitted to the Court a Stipulation of Undisputed Facts dated October 27, 2003;

NOW THEREFORE, IT IS HEREBY FURTHER STIPULATED AND AGREED by and between counsel for Plaintiffs and counsel for Defendants, as a supplement to stipulations 1 – 176 contained in the parties' October 27, 2003 Stipulation of Undisputed Facts, as follows:

* * *

229. The Enacted 2002 Plan pairs four of the 2000 incumbents. This includes two Democrat-Democrat pairs:

(a) Senators Stavisky and Hevesi; and
(b) Senators Gentile and Lachman.

* * *

233. The Plaintiffs' Original Plan pairs fourteen of the 2000 incumbents. This includes four Republican-Republican pairs:

(a) Senators Lack and Marcellino;
(b) Senators Balboni and Hannon;
(c) Senators Hoffman and Nozzolio; and
(d) Senators Rath and Volker.

The Plaintiffs' Original Plan also includes three Democrat-Republican pairs:

(e) Senators Hevesi (D) and Maltese (R);
(f) Senators Gentile (D) and Marchi (R); and
(g) Senators Gonzalez Jr. (D) and Velella (R).

* * *

Dated: November 3, 2003

* * *

PLAINTIFFS' OBJECTIONS TO THE PRIVILEGE RULINGS OF MAGISTRATE JUDGE FRANK MAAS AND REQUESTS FOR RULINGS ON UNRESOLVED ISSUES

Plaintiffs, by and through their attorneys, hereby submit these objections to the privilege rulings made by Magistrate Judge Frank Maas.

Background

In his July 28, 2003 Opinion and Order, Judge Maas held that any legislative privilege asserted by Senator Bruno is, at best, a *qualified* privilege. *See* Jul. 28 Opinion and Order at 21. Accordingly, Judge Maas engaged in a sensitive balancing of Senator Bruno's claimed need for secrecy and Plaintiffs' competing need for disclosure. Judge Maas found that Plaintiffs' claims "raise[] serious charges about the fairness and impartiality of some of the central institutions of our state government," that the withheld materials are highly relevant to Plaintiffs' claims, that the materials cannot be obtained through other means, and that the presence of non-legislator members on LATFOR "tends to weaken any claim" that its deliberations and documents must remain secret. *Id.* at 23-35. "For all of these reasons," Judge Maas ordered Senator Bruno to produce all documents except those reflecting communications that "took place outside LATFOR" or "after the proposed redistricting plan reached the floor of the legislature." *Id.* at 26; *see also id.* at 29.

On August 18, 2003, this Court affirmed Judge Maas's Opinion and Order in its entirety. *See* Aug. 18 Order at 2 (*"For the reasons set forth below, the court affirms Magistrate Judge Maas's Order."*) (emphasis in original). This Court found that Judge Maas's Opinion and Order was "neither contrary to law nor clearly erroneous." *Id.* at 3. Reviewing his conclusions *de novo*, this Court held that Judge Maas "correctly analyzed the law pertaining to

legislative privilege," that "legislative privilege is not absolute," that Judge Maas considered the correct factors, and that he "appropriately balanced these factors" in concluding that the information Plaintiffs seek is discoverable. *Id.* at 3.

Subsequent to this Court's August 18 Order, Judge Maas engaged in a further analysis of which documents were created and disseminated within LATFOR (and therefore must be produced), and which documents were created and disseminated only "outside" of LATFOR (and therefore may be withheld as privileged). Applying this standard, Judge Maas ordered Defendants to produce all of the withheld documents that were sent to Debra Levine (the Executive Director of LATFOR) or Vinny Bruy (a former non-legislator member of LATFOR). Tr. Sep. 3, 2003 at 14:22-15:10, 17:21-23.

Judge Maas then engaged in a document-by-document in camera review of the remaining purportedly privileged documents. With one exception, Judge Maas held that Plaintiffs are not entitled to any of the documents that reflect requests by Senators to adjust the lines of their districts in ways they believed would enhance their chances to prevail in future elections. *See* Sep. 10, 2003 Memorandum Decision at 6.[1] Judge Maas then ordered Defendants to produce documents relating to the increase in the size of the Senate from 61 to 62 seats, finding that this "was not an issue the Senate majority sought to keep carefully cloistered," as reflected by the fact that LATFOR voluntarily posted on its website a legal memorandum that

[1] Judge Maas did order Defendants to produce one such document – a December 13, 2001 memorandum from Mr. Burgeson to Senator Skelos discussing the "removal of black population" in Queens. Judge Maas found that, with respect to this document, "the qualified privilege must yield to the plaintiffs' need for information." Memorandum Decision at 7.

Mr. Carvin sent Senators Bruno and Skelos on that subject. *Id.* at 7-8.

With respect to depositions, Judge Maas held that Plaintiffs may depose LATFOR staff, but that Plaintiffs may not depose individual legislators or the members of their staffs. *See* Tr. Sep. 11, 2003 at 12:25-14:22.[2]

Overall, Plaintiffs believe that Judge Maas's privilege rulings fairly and appropriately balanced the parties' competing interests, as he was required to do by the qualified privilege standard that governs this case. We take issue with Judge Maas's rulings only in a few limited respects. To begin with, Judge Maas should have held that whatever legislative privilege applies has been waived – both because of the active role that Senator Bruno voluntarily assumed as lead defendant in this case, and because of the documents that he has selectively and strategically produced. Second, Judge Maas should have required Defendants to produce all documents relating to the specific Senate Districts that are being challenged.

Finally, in light of the substantial delay in resolving the legislative privilege issues (which Plaintiffs have taken every possible step to avoid since this Court's ruling on Defendants' motion to dismiss in June), we request that this Court resolve an important issue relating to the Burgeson deposition that Judge Maas has not yet addressed. We also request that the Court clarify that Plaintiffs may take the depositions of LATFOR fact witnesses, a process that Defendants have effectively blocked, even though Plaintiffs

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[2] As discussed below, Judge Maas has not yet ruled on the issue of the appropriate scope of the deposition of Mr. Burgeson, a LATFOR official who Defendants have now designated as a testifying expert witness. *See* Point D, *infra*. The fact that Defendants failed to produce Mr. Burgeson's expert report on August 26, as Judge Maas expressly required them to do, has made it next to impossible for the parties to complete discovery by the September 26 cutoff that this Court has ordered. *See* Point E, *infra*.

likely will not be able to finish all such depositions until shortly after the September 26 cutoff (an adjustment that will not affect the summary judgment briefing schedule in any way).

A. Senator Bruno Has Waived Whatever Legislative Privilege He May Have

Plaintiffs have repeatedly argued that Senator Bruno has waived whatever legislative privilege he may have in its entirety by willingly assuming the role of lead defendant in this case and by refusing to be dismissed from the litigation with prejudice.

In his July 28 Opinion and Order, Judge Maas initially declined to resolve Plaintiffs' waiver argument – "at least at th[at] juncture" – finding that Senator Bruno had made a "colorable" argument that his participation in this litigation was "required" by N.Y. Unconsolidated Laws § 4221. *See* Jul. 28, 2003 Opinion and Order at 26. Tellingly, Senator Bruno has since abandoned that argument, and for good reason. Putting aside that the plain language of § 4221 only requires the President of the Senate to be *served* with the complaint in a redistricting lawsuit, not to be *named* as a defendant, Senator Bruno is not even the President of the Senate. The President of the Senate is the Lieutenant Governor, Mary Donahue, not Senator Bruno. *See* N.Y. Const. art. 4, § 6 ("The lieutenant-governor shall be the president of the senate . . . ."). Accordingly, § 4221 indisputably does not apply to Senator Bruno *at all*.

Because § 4221 did not "require" Senator Bruno to participate in this litigation, his voluntary assumption of the role of lead defendant constitutes a waiver of whatever legislative privilege he might otherwise have enjoyed.[3] In *Powell v. Ridge*, 247 F.3d 520 (3rd Cir. 2001), the Third

[3] As noted below, Plaintiffs offered to voluntarily dismiss Senator Bruno from this litigation, with prejudice, but he declined the offer.

Circuit recently held that a legislator defendant cannot voluntarily seek to participate as a defendant in a lawsuit (by declining to assert legislative immunity) but then assert legislative privilege as a purported shield against participating in discovery:

> Unlike the reluctant participants in the cases upon which they rely, the Legislative Leaders voluntarily installed themselves as defendants. And, unlike the reluctant participants in those cases, the Leaders wish to remain as defendants and participate as long as this case is around; at no time, we note, have they invoked legislative immunity as a basis for any of their various motions to dismiss. This is simply not a case of legislators caught up in litigation in which they do not wish to be involved. Rather, these are self-made defendants who seek to turn what has heretofore been the shield of legislative immunity into a sword.

Powell v. Ridge, 247 F.3d 520, 525 (3rd Cir. 2001). The Court squarely rejected the legislator defendants' contention that they should be permitted to "seek discovery, but not respond to it" or to "take depositions, but not be deposed." *Id.* at 522.

Judge Maas declined to follow the Third Circuit, relying instead on *Goldberg v. Rocky Hill*, 973 F.2d 70 (2d Cir. 1992), which, according to Judge Maas, stands for the proposition that state legislators cannot assert legislative immunity in cases is which they have been sued in their official capacities (as opposed to their personal capacities). Judge Maas found that Senator Bruno's participation as a defendant did not constitute a waiver of his legislative privilege because Senator Bruno is only named in his official capacity and therefore, under *Goldberg*, could not have moved to dismiss on the basis of legislative immunity. *See*

Tr. Sep. 3, 2003 at 5:24-7:19. Judge Maas's reliance on *Goldberg* is misplaced for three reasons.

To begin with, the underlying basis for Senator Bruno's assertion of legislative privilege has always been that he *could* have asserted legislative *immunity* if he had chosen to. Indeed, each of Senator Bruno's submissions to Judge Maas and to this Court contains a lengthy discussion of the doctrine of legislative immunity and arguments about why legislative immunity "includes" a correlative legislative evidentiary privilege. *See, e.g.*, Ltr. of John Braatz to Judge Maas (Jul. 11, 2003), at 7 ("Legislative Immunity Plainly Includes Testimonial and Evidentiary Privilege"). If, under *Goldberg*, the fact that Senator Bruno is only named in his official capacity means that he does not enjoy *any* common law legislative immunity of the sort recognized in *Tenney v. Brandenhove* and its progeny, then his legislative privilege arguments fall entirely of their own weight.

Second, *Goldberg* plainly did *not* hold that state legislators cannot assert legislative immunity in cases is which they have been sued in their official capacities. To the contrary, the plaintiff in *Goldberg* had agreed to *voluntarily dismiss* the individual legislator defendants (who were municipal councilmen, not state legislators) before the immunity issue reached the Second Circuit, leaving the town itself as the lone remaining defendant. *See* 973 F.2d at 71. The only holding in *Goldberg* was that the *town*, not the individual municipal legislators, had no immunity: "[W]e hold that there is no immunity defense, either qualified or absolute, available to a municipality sought to be held liable under 42 U.S.C. § 1983." *Id.* at 74.

To be sure, the *Goldberg* opinion contains (and Senator Bruno and Judge Maas both relied upon) a quote from *Kentucky v. Graham*, 473 U.S. 159 (1985), in which the Supreme Court said, in an entirely different context, that "[t]he only immunities that can be claimed in an official-

capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 167. But *Kentucky v. Graham* involved the issue of official immunity for *executive* state officials, not legislators. Unlike the individual defendants in *Kentucky v. Graham*, nobody would maintain that Senator Bruno is a necessary party in this action, which challenges a state statute administered by the Executive defendants.

Finally, this Court should not take seriously the implicit premise of Senator Bruno's *Goldberg* argument – that he wished to avoid participating in this lawsuit altogether by moving to dismiss on the basis of legislative immunity, but that he read *Goldberg* and reluctantly concluded that he had no way out. That is nonsense. It is plain that Senator Bruno intentionally thrust himself into the center of the defense of this lawsuit from the very beginning, and that he did so for the simple reason that, as Majority Leader, his interests are particularly implicated by Plaintiffs' challenge to the 2002 Senate Plan.

Indeed, as this Court is aware, Plaintiffs recently requested that Senator Bruno stipulate to being dismissed from this litigation *with prejudice* under FRCP 41(a) – a stipulation that would have forever extinguished all of Plaintiffs' claims against him – but Senator Bruno expressly refused to consent to such a dismissal. *See* Ltr. of Richard D. Emery to Judge Berman (Aug. 6, 2003). If Senator Bruno had been at all disappointed by his apparent inability under *Goldberg* to move to dismiss on the basis of legislative immunity, then surely he would have snapped up Plaintiffs' offer to dismiss him voluntarily and with prejudice Rule 41(a).

Having refused to be dismissed from this case with prejudice, there is no question that Senator Bruno is precisely the kind of "self-made defendant" that the Third

Circuit held cannot hide behind the cloak of legislative privilege. *Powell*, 247 F.3d at 525.[4]

B. Senator Bruno's Selective and Strategic Document Production Constitutes a Waiver of Any Privilege Claims With Respect To Documents Concerning the 34th or 35th Senate Districts

Assuming legislative privilege has not been waived in its entirety, Senator Bruno's strategic and selective document production plainly constitutes a waiver of whatever privilege otherwise might have applied to documents concerning the 34th and 35th Senate Districts (which Plaintiffs have challenged under the Equal Protection Clause and the Voting Rights Act).

Senator Bruno produced a January 28, 2002 memorandum (Bates S21581-82) authored by Vincent Bruy, then a member of LATFOR, to Senator Skelos, the Co-Chair of LATFOR, discussing a proposal to place the largely white Town of Eastchester in Senator Spano's 35th Senate District instead of in Senator Velella's 34th Senate District, and to include an equally populated part of the City of Yonkers in the 34th Senate District instead of the 35th Senate District. *See* Hecker Decl., Exhibit A. The memorandum cites voting patterns, polling data, Mr. Bruy's previous political advice to Senator Spano, and the long-term political strategies of both

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[4] In an August 11, 2003 letter to the three-judge Court, Senator Bruno attempted to avoid the consequences of *Powell v. Ridge* by citing *United States v. Helstoski*, 442 U.S. 477 (1979), for the proposition that any waiver of legislative privilege must be explicit and unequivocal. *Helstoski* plainly is inapposite. To begin with, that case involved the assertion of an *absolute* legislative privilege under the Speech and Debate Clause of the federal Constitution, not the assertion of whatever legislative privilege arises under federal common law, which, as this Court has held, is *qualified* at best. Moreover, *Helstoski* involved the assertion of privilege by a *criminal defendant* who was not even arguably immune from prosecution and who never was offered any form of dismissal; unlike here, it cannot be said that the defendant's participation in the criminal prosecution in *Helstoski* was in any way *voluntary*.

Senator Velella and Senator Spano. Defendants undoubtedly released this document in order to try to establish that Senate District 34 was drawn predominantly on the basis of political considerations and not, as Plaintiffs allege, predominantly on the basis of race.

Notwithstanding his strategic production of Mr. Bruy's January 28, 2002 memorandum, Senator Bruno nonetheless has asserted privilege and refused to produce any other memoranda that similarly are "between a Senator (or aide) and Mr. Burgeson or Mr. Bruy" – presumably because such memoranda are disadvantageous to his defense. Ltr. of John Braatz to Judge Maas (Aug. 25, 2003) at 4 (*see* Hecker Decl., Exhibit B).

By selectively producing only those supposedly "confidential" documents that he believes will help his case, Senator Bruno plainly is seeking, in the words of the Third Circuit, "to turn what has heretofore been the shield of legislative immunity into a sword." *Powell*, 247 F.3d 520, 525. Senator Bruno cannot rely affirmatively on those "confidential" documents that he likes but selectively withhold as privileged those documents he does not like. In light of his selective production, Judge Maas should have directed Senator Bruno to produce all documents relating to the 34th and 35th Senate Districts.[5]

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[5] During a conference call with Judge Maas, Mr. Carvin asserted that no waiver could result from the production of the January 28, 2002 Bruy memorandum because it was produced "only under compulsion" and "because it's under court order." Tr. Aug. 27, 2003 at 58:10-16. Contrary to Mr. Carvin's statement, Senator Bruno was never specifically ordered to produce the January 28, 2002 Bruy memorandum. Rather, Senator Bruno *chose* not to assert privilege with respect to that document and *chose* instead to produce it. During the same colloquy, Mr. Carvin also suggested that "the only reason" that Senator Bruno did not withhold the document as privileged was that "it was from a non-legislator to a legislator, which is different than all the documents we're withholding." *Id.* at 58:11-13. We gather that Mr. Carvin misspoke, and that he did not mean to concede that each of the many memoranda on the revised privileged log between non-legislators and legislators is not

C. Judge Maas Should Have Ordered Defendants to Produce Documents Relating to the Districts That Plaintiffs Have Challenged

As we have repeatedly observed, the qualified privilege analysis that governs this case requires the Court to balance Defendants' asserted need for secrecy against Plaintiffs' need to discover evidence to prove their claims. The five factors that must be balanced are: (1) the relevance of the evidence at issue; (2) the availability of other evidence; (3) the seriousness of the litigation; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government actors who will recognize that their secrets are discoverable. *See* Jul. 28, 2003 Opinion and Order at 21-22; Aug. 8 Order at 3.

Documents reflecting Senators' requests to move the borders of the districts that Plaintiffs are challenging could hardly be more relevant to their claims. Although Plaintiffs need not necessarily prove discriminatory intent in order to prevail on their Voting Rights Act claims, Judge Maas correctly recognized that Plaintiffs may prevail on their Voting Rights Act claims by fulfilling *either* the "intent test" or the "results test," and that contemporary statements by legislators therefore are "highly relevant." Jul. 28, 2003 Opinion and Order at 24. This holding directly applies to documents reflecting requests to move borders, which obviously are central to Plaintiffs' Equal Protection Clause challenge to the 34th Senate District – a claim that requires proof that the district was drawn predominantly on the basis of race.

Plaintiffs readily accept, as Judge Maas held, that there is no substantial need for Plaintiffs to discover

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(continued...)

privileged and should be produced. In any event, there is no basis to distinguish the January 28, 2002 Bruy memorandum that Senator Bruno did produce from the similar memoranda that he refuses to produce.

documents pertaining to districts that are not challenged in this lawsuit. But by failing to distinguish between discovery that pertains to challenged districts (which could include documents concerning districts adjacent to the challenged districts) and discovery that does not, Judge Maas necessarily failed to engage in the required balancing analysis, the very heart of which is the relevance inquiry. Because Plaintiffs have established a substantial – indeed, compelling – need for discovery relating to the districts they have challenged, Judge Maas should have ordered that those documents be produced.

D. Because Judge Maas Has Not Yet Ruled On the Scope of Mr. Burgeson's Expert Deposition, and Because Time Is of the Essence, This Court Should Resolve That Issue So the Deposition Can Proceed

As this Court is aware, Judge Maas ordered Defendants to produce Mark Burgeson – one of the chief architects of the 2002 Senate Plan, who has been a LATFOR employee since 1980 and who currently serves as Special Assistant to LATFOR Co-Chairman Skelos – to be deposed on a single, limited subject: the nature of LATFOR's operations. Through this limited deposition, Judge Maas wished to obtain more information about the way LATFOR operated in order to determine whether the documents over which Senator Bruno has asserted legislative privilege were created and disseminated "within" LATFOR or "outside" LATFOR – a distinction that Judge Maas found important in his privilege analysis. Mr. Carvin agreed to produce Mr. Burgeson on the limited subject of the nature of LATFOR's operations, but Mr. Carvin refused to permit Plaintiffs to question Mr. Burgeson about his intimate role in the design of the 2002 Senate Plan. *See* Tr. Sep. 3, 2003 at 9:15-24. This limited deposition of Mr. Burgeson took place on September 5, 2003.

After Mr. Burgeson's limited deposition was completed, Defendants revealed for the first time that they intend to use Mr. Burgeson as an expert witness in this case. According to Mr. Carvin's September 10, 2003 letter to Judge Maas (*see* Hecker Decl., Exhibit C), Mr. Burgeson's role as an expert witness will be to provide a purportedly "objective" assessment "of the enacted and alternative plans based upon accepted redistricting principles and publicly available information." Mr. Carvin nonetheless argued to Judge Maas that "Mr. Burgeson's involvement as an expert does not affect the application of legislative privilege to the fact discovery sought by Plaintiffs," because he "will not touch in any way upon the deliberative process or motivations of legislators or their aides in the development and enactment of the challenged plan."

In light of Defendants' designation of Mr. Burgeson as an expert witness, Plaintiffs plainly are entitled to the production of all purportedly privileged documents sent by or to Mr. Burgeson regarding the 2002 Senate Plan, and Plaintiffs plainly are entitled to depose Mr. Burgeson about his role in the redistricting process. When Defendants say that Mr. Burgeson's expert testimony will consist of an "objective assessment of the enacted and alternative plans based upon accepted redistricting principles and publicly available information," what they really mean to say is that he will testify about how an *outsider*, without the benefit of full information, could *characterize* the 2002 Senate Plan as having been drawn. But Mr. Burgeson is no outsider; to the contrary, he concededly was one of the chief architects of the challenged plan. Plaintiffs thus are plainly entitled to cross-examine Mr. Burgeson about whether his "objective" analysis of the plan is consistent with his *subjective* knowledge of how the plan *actually* was drawn.

As Plaintiffs argued to Judge Maas in Mr. Hecker's letter dated September 10 (*see* Hecker Decl., Exhibit D), whether Mr. Burgeson's "objective assessment" is consistent

with his *own actions in this very litigation* could hardly be more probative of the credibility of his expert opinion. Mr. Burgeson cannot be allowed to provide an "objective" analysis of the 2002 Senate Plan, based only on publicly available information, when he may well know for a fact that the inferences he purports to draw about how the plan was crafted are inconsistent with the deliberations that actually took place.

In footnote 1 of his September 10 Memorandum Decision, Judge Maas reserved decision on this issue. During a conference call the following day, Judge Maas explained that he did not believe the issue would be ripe for adjudication until Mr. Burgeson's expert report was produced on September 12. *See* Tr. Sep. 11, 2003 at 15:21-16:13.

Defendants produced Mr. Burgeson's expert report on September 12 (see Hecker Decl., Exhibit E), and it confirms beyond any doubt that the Burgeson materials that have been withheld on privilege grounds must be produced. In his expert report, Mr. Burgeson opines at length about *his activities* with LATFOR and about the activities of others to which he was privy. Indeed, his entire report is a defense of the 2002 Senate Plan, of which he was the primary draftsman. Because the information relied upon in Mr. Burgeson's report necessarily overlaps with the information he used when drawing the Senate districts, it cannot seriously be disputed that his designation as a testifying expert constitutes a waiver of whatever legislative privilege he might otherwise have been entitled to assert. Mr. Burgeson cannot be permitted to provide selective, sanitized testimony about the supposed nature of the 2002 Senate Plan but refrain from producing and being questioned about contemporaneous documents or instructions that he authored or received and that may well contradict his theoretical opinion.

Although Judge Maas has yet to rule on this issue, at this point we believe it would be prudent for this Court to resolve it. Objections to Judge Maas's ruling likely will be taken no matter what he decides, and there is not nearly enough time left in the discovery schedule to await the resolution of a further round of objections before proceeding with this expert deposition. Plaintiffs respectfully request that this Court order Defendants to produce all of the withheld documents that were authored by or sent to Mr. Burgeson, and to permit him to be questioned about those documents and about any other aspects of his intimate role in the 2002 redistricting.

E. To the Extent That Any of Senator Bruno's Assertions of Legislative Privilege Are Rejected, the Court Should Permit Plaintiffs, If Necessary, To Continue To Take Depositions After September 26

Despite Plaintiffs' best efforts to complete document and deposition discovery before the September 26 cutoff, and through no fault of their own, it is now likely that doing so will not be possible. Although Judge Maas ruled long ago that Senator Bruno's assertions of legislative privilege would be rejected at least in substantial part (a ruling that this Court affirmed), and although Judge Maas has ordered him to produce a variety of purportedly privileged documents, Senator Bruno has refused to turn over the vast majority of those documents pending resolution by this Court of his objections to Judge Maas's rulings. Plaintiffs effectively are precluded from taking fact witness depositions until documents have been produced. And in any event, *Defendants have expressly refused to comply* with Judge Maas's order that they produce LATFOR staffers for deposition, pending resolution by this Court of their objections to that ruling. *See* Tr. Sep. 11, 2003 at 12:4-11.

Making matters significantly worse, Defendants flouted Judge Maas's order that they produce by August 26

all expert reports that do not respond to Plaintiffs' expert racial bloc voting analyses. As detailed in Mr. Emery's letter to Judge Maas dated September 16, 2003 (*see* Hecker Decl, Exhibit F), Defendants did not produce Mr. Burgeson's expert report (which does not even arguably speak to racial bloc voting) until September 12 – two and a half weeks past the deadline. Indeed, Defendants did not even reveal that they were planning to use Mr. Burgeson as an expert witness until September 5, by which time the parties had been litigating privilege issues relating to Mr. Burgeson *for months*. Had Defendants identified Mr. Burgeson as an expert and produced his report by August 26 as Judge Maas ordered them to do, all of the Burgeson privilege issues could have been advanced, and we would not now find ourselves, one week before the discovery cutoff, without the ruling from this Court that Defendants insist is necessary before documents and witnesses will be produced.[6]

Plaintiffs have proposed a simple solution to Defendants: to the extent that this Court orders any documents to be produced and allows any depositions of LATFOR staffers to go forward, Plaintiffs should be permitted to take those depositions after September 26, if necessary. Importantly, the modest accommodation Plaintiffs seek *would not affect the summary judgment schedule in any way*, for there is no reason why Defendants cannot work on their summary judgment papers while LATFOR staffer depositions are being finalized. Inexplicably, Defendants refused to join Plaintiffs in this request to this Court, stating only that they believe the September 26 cutoff is "binding on both sides."

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[6] It should be noted that Senator Bruno has moved to preclude a supplemental expert report submitted by Plaintiff-Intervenor PRLDEF, arguing that the supplemental report "obviously" would cause him to "suffer severe prejudice" because "there are only 10 days remaining in the discovery period." *See* Ltr. of Louis Fisher to Judge Maas (Sep. 16, 2003) (*see* Hecker Decl., Exhibit G).

It bears emphasis that Plaintiffs have seen this problem lurking on the horizon for quite some time and have done everything humanly possible to avoid it. When Judge Maas first indicated during the August 27 teleconference that he intended to defer making definitive privilege rulings until Mr. Burgeson could be deposed regarding the nature of LATFOR's operations, Plaintiffs immediately wrote a letter to Judge Maas urging him not to wait an entire week for the Burgeson deposition (Defendants were unable to produce him sooner) because "precious time will be lost between now and then." *See* Ltr. of Richard Emery to Judge Maas (Aug. 27, 2003) at 2 (*see* Hecker Decl., Exhibit H); *see also* Tr. Aug. 27, 2003 at 51:6-12. Because Judge Maas did not issue his written privilege rulings until September 10, Plaintiffs pressed for a compressed schedule through which objections would be fully briefed by September 12, but Defendants would not agree to that schedule (because they were too busy deposing Plaintiffs' experts). *See* Tr. Sep. 11, 2003 at 10:1-11:1. This is precisely the "doomsday scenario" that Plaintiffs have repeatedly warned about and sought to avoid. *See* Tr. Sep. 3, 2003 at 48:15-22.

Although they refuse to consent to Plaintiffs' modest and eminently reasonable proposal, Defendants sought to extend fact discovery for themselves. In fact, Defendants have demonstrated that they agree with Plaintiffs that fact discovery cannot be completed until the privilege issues are resolved. In his September 5 letter to Judge Maas identifying Defendants' expert and fact witnesses (*see* Hecker Decl., Exhibit I), Mr. Carvin expressly reserved the right to supplement his lists, observing that he could not provide a complete list "until . . . the legislative privilege issue is resolved." If Defendants cannot even identify their witnesses until these issues are resolved, then surely Plaintiffs cannot be expected to complete document and deposition discovery until these issues are resolved.

CONCLUSION

For the reasons set forth above, Plaintiffs objections to Judge Maas's privilege rulings should be sustained, and the September 26 discovery cutoff should be extended briefly to allow Plaintiffs to depose fact witnesses who Defendants have refused to produce.

Dated: September 17, 2003
New York, New York

* * *

September 22, 2003

* * *

Dear Chief Judge Walker, Judge Berman, and Judge Koeltl:

This firm represents the Plaintiffs in this matter. We write briefly to note our limited objection to Judge Maas's Discovery Order dated today.

In the objections we submitted to this Court on September 17, we argued that Defendants' designation of Mr. Burgeson as a testifying expert witness constitutes a waiver of whatever legislative privilege otherwise would have applied to the documents and testimony relevant to his earlier activities as primary draftsman of the Senate Plan. As we pointed out, Mr. Burgeson cannot be permitted to offer a purportedly "objective" analysis of how the 2002 Senate Plan appears to have been drawn without also providing information about how he, as chief architect of the plan, *actually drew it*. *See* Sep. 17 Objections, Point D, at 11-13; *see also* Sep. 18 Reply, Point C, at 7-9.

In the Order he issued today, Judge Maas held, without explanation, that Mr. Burgeson's designation as a testifying expert witness "does not open the door for the plaintiffs to inquire into the reasons why he . . . drew the lines for particular Senate districts in the ways that [he] did." Discovery Order (9/22/03) at 4. We respectfully object to that ruling. Judge Maas offered no reason at all, much less a persuasive reason, why questioning about Mr. Burgeson's concededly intimate role in the redistricting is not directly probative of the credibility of his expert opinion and why it is not expressly permitted, notwithstanding any assertion of privilege, by Rules 26(a)(2)(B) and 26(b)(4)(B) of the Federal Rules of Civil Procedure.

This is especially true in light of Mr. Burgeson's express concession during his limited deposition last Friday

that *there is "no way" he could "separate" his experience as chief architect of the plan with his preparation of his expert report.* Tr. 9/19/03 at 14:25-15:23 (emphasis supplied) (relevant excerpts attached hereto as Exhibit A).

For these reasons, and for the reasons stated in our previous papers, this Court should rule that Plaintiffs are entitled to depose Mr. Burgeson as any other expert in any other litigation would be deposed – including questioning about prior experience in drafting the redistricting plan that is the heart of this case. Defendants cannot wield Mr. Burgeson's expert report as a sword but seek to hide him behind the shield of legislative privilege. *See Powell v. Ridge*, 247 F.3d 520, 525 (3rd Cir. 2001)

Finally, a quick word on depositions. In our papers, we explained why we believe that this Court should allow Plaintiffs to take depositions after the discovery cutoff with respect to the fact witnesses who Defendants would not allow to be deposed, despite Judge Maas's order, pending the resolution of objections to this Court. In their reply, Defendants requested that discovery not take place during the week of September 29 because they will be working on their summary judgment papers. *See* Defendants' Reply (9/18/93) at 13. We have no objection to this request. If this Court does not rule in time for Plaintiffs to depose fact witnesses by September 26, then we would agree to take those depositions during the week of October 6 (which would not in any way affect the summary judgment schedule).

* * *

(2)

Supreme Court, U.S.
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No. 04-218

IN THE

Supreme Court of the United States

ERIC RODRIGUEZ, et. al.,
Appellants,
v.
GEORGE E. PATAKI,
Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR KISHA THOMAS, CLIFTON BELOW, BASSEL CHARLES KORKOR, PATRICIA RAYCHER KREITZER, AND JOHN PATRICK TRACY AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

JEFFREY M. WICE
P.O. Box 42442
Washington, D.C. 20015
(202) 494-7991

RONALD A. KLAIN
JONATHAN D. HACKER
(*Counsel of Record*)
CHARLES E. BORDEN
DAVID P. BERGER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are residents of several states possessing state legislative maps with total maximum population deviations that are near or exceed ten percent. Kisha Thomas is a resident of Baton Rouge, Louisiana. The Louisiana State Senate and House of Representatives both have overall population deviations exceeding 9.9%. Clifton Below is a resident of Lebanon, New Hampshire. Redistricting legislation enacted this year by the State of New Hampshire increases the overall population deviation of their State Senate from 5.46% to 9.48% and of their House of Representatives from 9.26% to 14.8%. Bassel Charles Korkor is a resident of Columbus, Ohio. The Ohio State Senate has an overall population deviation of 8.1% and the House of Representatives has an overall population deviation of 12.46%. Patricia Raycher Kreitzer is a resident of Rutland, Vermont, and John Patrick Tracy is a resident of Burlington, Vermont. The Vermont State Senate has an overall population deviation of 14.28% and the House of Representatives has an overall population deviation of 18.99%.

Amici curiae are concerned that, as a result of the growing confusion over the proper standard for adjudicating population deviations in state legislative maps, there is a substantial risk that their right to vote will be impermissibly diluted during the next redistricting cycle. *Amici curiae* fear that, in the absence of explicit guidance from this Court, substantial uncertainty will exist among both legislatures and courts during subsequent redistricting cycles regarding whether and under what circumstances population deviations are permissible in state and local legislative redistricting. *Amici curiae* therefore urge this Court to note probable jurisdiction in this

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. The State Legislative Policy Institute made a financial contribution to this brief authored this brief in whole or in part.

case to prevent confusion by states and to provide the proper standard for state and local legislative redistricting.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of a challenge by several New York residents to the constitutionality of the New York State Senate map. The State Senate map contains a maximum population deviation of 9.78%, and plaintiffs contend that these deviations – resulting in the relative overpopulation of certain State Senate districts and the relative underpopulation of others – violate the Equal Protection Clause under "one person, one vote" principles. The three-judge court upheld that map despite such deviations, holding that, under this Court's "one person, one vote" precedents governing *state legislative districts* (as opposed to congressional districts), a districting plan with a maximum population deviation of less than 10% is entitled to a strong presumption of constitutionality, subject to invalidation only where the deviations are justified solely by illegitimate reasons.

That holding implicates a direct and irreconcilable conflict in the courts over the legal standard applicable to "one person, one vote" challenges to state legislative redistricting plans.

During the more than forty years that have passed since the adoption of the "one person, one vote" requirement for state legislative districts in *Reynolds v. Sims*, 377 U.S. 533, 558 (1964), this Court has repeatedly affirmed the basic principle that state legislative maps may contain *de minimis* variations in district populations. The courts have sharply divided, however, over how to evaluate plans that contain such variations. At one extreme is the recent decision by the three-judge panel in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), summarily affirmed by this Court less than four months ago, *Cox v. Larios*, 124 S. Ct. 2806 (U.S. 2004). *Larios* holds that *every* deviation from absolute population equality, no matter how miniscule, must be justified by a

specific, legitimate state interest. At the other extreme are numerous decisions holding that *de minimis* population deviations are *per se* lawful, so long as they do not exceed 10%. *See, e.g., Frank v. Forest County*, 336 F.3d 570, 573 (7th Cir. 2003); *Wright v. City of Albany*, 306 F. Supp. 2d 1228, 1231 n.5 (M.D. Ga. 2003); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 631 (D.S.C. 2002); *Gorin v. Karpan*, 775 F. Supp. 1430, 1437 (D. Wyo. 1991); *Black Political Task Force v. Connolly*, 679 F. Supp. 109, 123 (D. Mass. 1988); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 827 (Fla. 2002); *Legislative Redistricting Cases*, 331 Md. 574, 595 (1993).

Between these poles are decisions – including the decision below – holding that deviations of less than 10% are entitled only to a presumption of constitutionality, but these decisions divide further over the nature of the presumption. Some opinions join the decision below in applying a "strong" presumption, holding that state legislative districting plans with deviations less than 10% may be invalidated only if the plaintiffs prove that the deviations were based entirely on illegitimate considerations. *See Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994); *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1286 (S.D. Ala. 2002). Other decisions apply a "weak" presumption, holding that a districting plan with deviations of less than 10% may be invalidated even if some legitimate motives were involved, so long as illegitimate considerations were sufficiently prevalent to have tainted the process. *See Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001).

The conflict and uncertainty over a matter of such fundamental legal, political and social significance cannot be tolerated. A state legislature facing the task of redistricting – arguably the most important task of self-government – now can have little if any idea exactly what will be expected of it in terms of deviations from absolute mathematical equality.

Is any deviation up to 10%, for any reason, *per se* permissible? Must each deviation be justified? What justifications are legitimate? Are "mixed motives" lawful? As the division among the courts makes clear, these and many other questions have no ready answers under existing precedents. No just end of government is served when state legislatures are guided in their districting decisions by the light of such dim beacons.

Although it is perhaps counter-intuitive, the fact that most of the redistricting litigation that arose after the 2000 census has come to a close only underscores the urgent need for plenary review in this case. This proceeding likely represents the last chance this Court will have before the 2010 districting round to provide guidance on the appropriate standards for adjudicating "one person, one vote" claims in the state legislative context. If the Court does not hear this case on its merits, state legislatures will almost certainly endure another round of redistricting confusion, spawning widespread one-person, one-vote litigation, which will be subject to disparate judicial standards, leading to disuniformity and unfairness with respect to the most fundamental of all rights – the right to vote. It is thus essential that this Court note probable jurisdiction in this case and clarify the proper standard for assessing population deviations in state legislative maps.

Finally, although we submit that *any* one standard is likely better than the current state of disarray, if the Court does not note probable jurisdiction it should reverse the decision below and reject the strong presumption of legality applied in this case. Under a standard requiring proof that deviations of less than 10% were *solely* the result of illegitimate considerations, a state legislature would be permitted to dilute certain citizens' votes for predominantly impermissible purposes, as long as it did not do so solely for impermissible purposes. Surely the equal right to vote is not so illusory. The Court should also make clear that, for purposes of a *one-person, one-vote claim* partisan considerations are *not* a le-

gitimate reason for diluting the votes of a subset of the citizenry. Partisan considerations may well be permissible in the context of a gerrymandering/appearance claim, but such claims are "analytically distinct" from vote dilution claims, *see Shaw v. Reno*, 509 U.S. 630, 652 (1993), and party affiliation should play no role at all in the weight a state legislature decides to assign to a given population's vote. Simply stated, there is no plausible justification for allowing the party in control of the machinery of government to use its power to invidiously discriminate against its political opponents by diluting their votes; indeed, such a concept runs counter to fundamental principles of democracy.

Accordingly, this Court should note probable jurisdiction, either to reverse the erroneous ruling below – or, if it is inclined to affirm, so as to provide clear direction as we approach the next round of redistricting.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW REFLECTS TWO GROWING CONFLICTS AMONG STATE AND FEDERAL COURTS REGARDING THE PERMISSIBILITY OF POPULATION DEVIATIONS IN STATE LEGISLATIVE DISTRICTING.

The decision of the three-judge panel below, in finding that the maximum population deviation of 9.78% in the New York State Senate district map was lawful, squarely implicated two current conflicts among state and federal courts which are in urgent need of resolution. *First*, in concluding that state legislative maps are not required to have absolute population equality, the court below took a position that was diametrically opposed to the one taken by the panel in *Larios*. *Compare Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 363-64 *with Larios*, 300 F. Supp. 2d at 1337-38. The decision below thus exacerbates already existing uncertainty over whether state legislative maps should be subject to a zero population deviation standard. *Second*, in interpreting the

"ten percent rule" as mandating that deviations of less than ten percent enjoy a strong presumption of constitutionality, the three-judge panel further deepened the conflicts among various federal and state courts over the proper meaning and application of the "ten percent rule."

This Court should note probable jurisdiction to resolve both of these issues.

A. There Is A Clear Conflict Over The Permissibility Of *De Minimis* Population Deviations In State Legislative Maps.

The most basic conflict implicated by the decision below is whether state legislative districting plans are subject to a standard of absolute population equality or whether they may contain *de minimis* population deviations.

Starting with its earliest "one person, one vote" decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has indicated that although state legislative districts must adhere to general population equality, some *de minimis* population would likely be permissible. Indeed, this Court has suggested that pure mathematical equality, if required in the context of state legislatures, might come at the expense of effective representation. *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). In *Brown v. Thomson*, 462 U.S. 835 (1983), this Court identified a 10% deviation as a constitutional benchmark for evaluating vote-dilution challenges to state legislative districts. *Id.* at 842.

Most courts, including the three-judge panel below, have read this Court's precedents to hold that "if the maximum population deviation between districts in a redistricting plan is under ten percent, the state has no burden to justify that deviation." *Rodriguez*, 308 F. Supp. 2d at 364. Some courts have held that such a plan is altogether immune from challenge; others have held that, while the state has no burden to justify the deviation, a plaintiff nevertheless can prevail by proving that the deviation is not justifiable. We discuss that controversy below, *infra* at 8-12; what matters for present

purposes is that most courts accept the basic principle that state legislative districts may depart from absolute population equality in some *de minimis* measure of up to 10%.

That understanding stands in sharp contrast to the decision of the three-judge panel in *Larios*, 300 F. Supp. 2d at 1337-38, which was summarily affirmed by this Court in June, *Cox v. Larios*, 124 S. Ct. 2806 (U.S. 2004). The *Larios* court concluded that "deviations from exact population equality" in state legislative maps may only be allowed when they "further legitimate state interests such as making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings." *Id.* at 1337. In adopting this standard, the three-judge panel in *Larios* essentially imported the standard for assessing population equality for Congressional maps – specifically the standard promulgated by this Court in *Karcher v. Daggett*, 462 U.S. 725 (1983) – into the state legislative context. *See Larios*, 300 F. Supp. 2d at 1338, 1352 (evaluating maps under *Karcher* standard). And because there is no such thing as a *de minimis* population deviation with respect to Congressional districting, *Karcher*, 462 U.S. at 734, the *Larios* court effectively adopted a population equality standard for state legislative districts that also does not permit such minor deviations.

Although a few courts prior to *Larios* had embraced a similar *de facto* zero population deviation standard for state legislative districts, *see, e.g., Story v. Anderson*, 611 P.2d 764, 767 (Wash. 1980) (only minor deviations acceptable and those must be in order to achieve "legitimate, rational state objectives"), most had interpreted *Reynolds*, *Gaffney*, and their progeny as allowing for *de minimis* variations in legislative district populations that do not need to be justified by the State. *See infra* at 8-11. By affirming *Larios*, this Court cast doubt on that long line of precedent and – more important – on the continued viability of the many state legislative maps with *de minimis* population deviations. In turn, the decision

in this case casts doubt on the continuing validity of *Larios*, even though that decision was summarily affirmed by this Court just last Term. This conflict cries out for resolution. The demanding standard of *Larios* – which forces states to justify every departure from absolute population equality, with little regard for any 10% deviation benchmark – is either the correct standard governing state legislative redistricting, or it is not. State legislators should know the answer before the next round of districting, for it is a distinction with direct and obvious consequences for the redistricting process: a map that gets drawn under a presumption (either whether conclusive or rebuttable) that a 10% deviation is permissible without further inquiry will look nothing like a map drawn under the presumption that *every* minor deviation must be specifically justified. At a minimum, then, the Court should grant plenary review to decide whether the *Larios* rule, or the 10% benchmark rule identified in this Court's precedents, should govern one-person, one-vote challenges to state legislative redistricting plans.

B. There Is A Clear Conflict Over The Meaning Of The "Ten Percent Rule."

The decision below implicates a second, related conflict among the federal and state courts: assuming *de minimis* population deviations *are* justified, whether the 10% benchmark is an absolute safe harbor or a presumption of validity, and if it is the latter, how strong the presumption should be. The Court should note probable jurisdiction to resolve that important controversy as well.

1. Most lower courts view the 10% rule – incorrectly, we submit – as a "safe harbor." These courts treat legislative plans with a maximum population deviation of less than 10% as being altogether immune from any "one person, one vote" challenges. *See, e.g., Frank*, 336 F.3d at 573 (observing that *Brown* makes it clear that "ten percent rule" creates safe harbor); *Wright*, 306 F. Supp. 2d at 1231 n.5 ("The Supreme

Court has created a 'safe harbor' in regards to deviations. While the deviation is an important factor for the Court to consider, anything less than 10% is within the 'safe harbor.'"); *Colleton County Council*, 201 F. Supp. 2d at 631 ("Generally, a 'safe harbor' exists for legislatively implemented plans achieving less than a 10% deviation.").[2] If the challenge in this case had been brought before any of these courts, the mere fact that the New York map had a population deviation of less than 10% would have been sufficient to end the "one person, one vote" inquiry, and plaintiffs' claim would have been dismissed on the pleadings.[3]

2. The fact that the "one person, one vote" claim in this case could not be rejected until summary judgment demonstrates the difference between the safe harbor approach and the "strong presumption" rule applied by the court in this

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[2] *See also Black Political Task Force*, 679 F. Supp. at 123 ("The new City of Boston electoral districts and the State Senate and Councillor Districts fall within the *de minimis* ten percent deviation rule that insulates state redistricting plans from effective challenge as violative of the 'one person, one vote' precept."); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 827 ("Given that the statistical overall ranges for the House and Senate districts . . . each fall well under the 10% deviation that the Supreme Court and this Court have recognized as constitutionally valid, we find that the Legislature has achieved a mathematical preciseness in the districts that complies with the equal protection requirements of both the Florida and United States Constitutions."); *Legislative Redistricting Cases*, 331 Md. at 595 ("But the Supreme Court has unequivocally built a 10% degree of flexibility into the one person, one vote requirement so that states can accommodate important concerns in reapportioning their legislatures. The Governor's plan undeniably remains within that degree of flexibility, and is therefore valid under federal equal protection principles.").

[3] *Amici curiae* do not, of course, believe either that "safe harbor" approach represents the correct interpretation of the "ten percent rule" or that plaintiffs' suit should have been dismissed on a motion to dismiss. They make this point merely to illustrate that the interpretation of the "ten percent rule" that a court chooses can have substantial substantive consequences, and can result in some instances in the litigation in question being shortened or extended by months or even years.

case. *See Rodriguez*, 308 F. Supp. 2d at 364-65. The strong presumption rule embraces the position that legislative plans with deviations of less than 10% are presumptively constitutional, but that a plaintiff can rebut that presumption by offering additional extrinsic evidence demonstrating that the deviations were *wholly* the product of invidious discrimination. *See id.* at 365 ("Thus, if the plaintiff can present compelling evidence that the drafters of the plan ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others, a one-person, one-vote action will lie even with deviations below ten percent.") (quotation omitted). Other courts have also adopted this rule. *See Marylanders for Fair Representation*, 849 F. Supp. at 1032 ("To prevail, though, the plaintiffs have the burden of showing that the 'minor' deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy. Thus, the plaintiff must demonstrate . . . that the asserted unconstitutional or irrational state policy is the actual reason for the deviation."); *Montiel*, 215 F. Supp. 2d at 1286 (following *Marylanders for Fair Representation*). Under this approach, plaintiffs challenging a state legislative map on the basis of a "one person, one vote" argument have a very high hurdle to clear – they can only prevail by showing that the deviations entirely resulted "from an impermissible or irrational purpose." *Rodriguez*, 308 F. Supp. 2d at 364. Although they set the bar high, the courts that embrace the "strong presumption" approach at least accept "the proposition that the 'ten percent rule' is not meant to protect a state that is systematically disadvantaging groups of voters with no permissible rational justification for the disproportion." *Id.* Those courts that have adopted the "safe harbor" approach, by contrast, make no such concession: so long as the plan reflects a maximum population deviation of less than 10%, any justification for the deviation – or no justification – is permissible.

3. Despite that important difference, however, both the "strong presumption" approach and "safe harbor" approach

are significantly deferential to a state legislature's decision to enact a map with *de minimis* population deviations. In fact, the court below noted that it was adopting a rigorous standard for challenging state legislative maps because "[i]f the burden on the plaintiffs in minor-deviation cases were anything less than this substantial showing, then the plaintiffs would be able to challenge any minimally deviant redistricting scheme." *Rodriguez*, 308 F. Supp. 2d at 365. That measure of deference is absent from the third approach some courts follow, which is essentially a "weak presumption" that plans within the 10% benchmark are valid. Under the "weak presumption" approach, a plaintiff can carry his burden of proof merely by demonstrating that "the apportionment process had a 'taint of arbitrariness or discrimination.'" *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *see also Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001) (following *Daly*). Thus, under the "weak presumption," plaintiffs challenging a state legislative map on "one person, one vote" grounds do not need to show that illegitimate considerations were the sole cause for the deviations; rather, demonstrating that such illegitimate considerations were sufficiently prevalent to "taint" the apportionment process is enough to rebut the presumption of constitutionality.

4. The standard set out in *Larios* is the least deferential of all. The three-judge panel in *Larios* held that even a deviation of less than 10% must be justified by a legitimate state interest, and a plaintiff can establish a plan's invalidity simply by demonstrating that its minor deviations were not *entirely* the product of legitimate state interests. *Larios*, 300 F. Supp. 2d at 1338 ("[W]here population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny."). Put another way, the *Larios* approach is the flip-side of the "strong presumption" approach utilized in this case. The burden on the plaintiffs here was to show that *all* of the deviations in the state legislative map were the

product of illegitimate purpose; under the *Larios* standard, plaintiffs would only need to show that at least one of the deviations in the state legislative districting plan was the product of an illegitimate purpose to prevail.

* * * * *

As the Seventh Circuit observed in *Frank v. Forest County*, the purpose of the "ten percent rule" is to provide the lower courts with some degree of guidance in their efforts to adjudicate redistricting lawsuits, because "there is no theoretical guidance [on] how to balance the various considerations that political science might deem relevant to conforming districted governments to the principles of democracy." 336 F.3d at 572. Even before *Larios* the extent to which the "ten percent rule" was offering effective guidance to lower courts was questionable, and, in the wake of *Larios*, it is now even less likely that the rule will fulfill its essential purpose of minimizing judicial involvement in the redistricting process. *Id.* at 572-73. Accordingly, this Court should grant review to resolve the conflicts pervading this important area of the law and to clarify the meaning of the "ten percent rule."

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW IS WRONG ON THE MERITS.

In addition to granting review to resolve the confusion among lower courts over the appropriate standard for evaluating population deviations in state legislative maps, this Court should also note probable jurisdiction because the decision below was clearly wrong.

First, whatever may be the precisely correct formulation of the "ten percent rule," the "strong presumption" approach utilized by the three-judge panel in this proceeding is plainly wrong. Unlike the "safe harbor" approach, which essentially deems state legislative districts which deviate by less than 10% to be equally populated, the "strong presumption" approach concedes that deviations of under 10% can violate the

Equal Protection Clause.[4] The approach actually invalidates plans, however, only when the less-than-10% dilution is *solely* the result of illegitimate or impermissible policies. *See Rodriguez*, 308 F. Supp. 2d at 365; *Marylanders*, 849 F. Supp. at 1032. In other words, this approach still permits deviations in the state legislative map are largely, or even predominantly, the result of illegitimate policies. Under the reasoning of the court below, a state legislature could draw districts with deviations of nearly 10% for the express purpose of preserving the clout in the legislature of a particular geographic region so long as the legislature could also invoke some legitimate reason for deviations (*e.g.*, avoiding incumbent pairings) as "cover" for its conduct.[5] Such a result is illogical and indefensible: if *de minimis* mathematical deviations can dilute the right to vote at all, then such dilution, when motivated by an ill purpose, should not be rendered acceptable by the recitation of some additional, legitimate consideration said to have played a role in the districting decision. When improper factors predominantly motivated a decision to dilute votes, that decision (and the resulting district map) should be invalidated, even if the dilution reflects a population variance of less than 10%.

Second, the three-judge panel also manifestly erred in implying that political or partisan considerations can justify diluting citizens' voting rights. In assessing plaintiffs' claim that the deviations in the State Senate map were the product of an effort to overrepresent "upstate" voters at the expense of "downstate" voters, the court below noted that "[j]ust as in

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[4] To be clear: *amici curiae* do not endorse the "safe harbor" approach – indeed, they believe, for a variety of reasons, that it is also an incorrect interpretation of the "ten percent rule." But because the "safe harbor" approach is not actually at issue in this litigation, we need not address it further.

[5] Legitimate state interests include "making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings." *Larios*, 300 F. Supp. 2d at 1337.

the racial context where courts must deal with the overlap of racial identity and partisan identification and still conclude that the districting is racially – and not simply politically – drawn to find an equal protection violation," plaintiffs in the one-person, one-vote context must demonstrate that the districting "can be traced to impermissible considerations." *Rodriguez*, 308 F. Supp. 2d at 368. The court went on to observe that because "[i]n New York State, [there is a] traditional correlation between 'upstate' districts and Republican political identification," the plaintiffs "needed to proffer more than a mere assertion of a Senate conspiracy for 'upstate' ascendancy to meet their burden of showing a violation of the one-person, one-vote principle." *Id.* Thus, the three-judge panel essentially held that plaintiffs had failed to carry their burden of proof because they could not show that the deviations in the State Senate map were the result of regional, as opposed to political, discrimination. Implicit in that analysis is the conclusion that deviations drawn for the purpose of political advantage are constitutionally sound.

Although politically motivated redistricting has long been an accepted part of the decennial process, *see Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment... The reality is that districting inevitably has and is intended to have substantial political consequences."), the issue of whether politics can justify vote dilution is, as the *Larios* court recognized, a separate inquiry. *Larios*, 300 F. Supp. 2d at 1351 ("However, the Supreme Court's recognition of the politics inherent in districting arose in the context of political gerrymandering. Today, we have no occasion to consider the limits of partisan gerrymandering, but rather the very different set of considerations invoked by a claim that the one person, one vote principle has been violated."); *see Shaw*, 509 U.S. at 652 (vote-dilution claims are "analytically distinct" from racial gerrymandering claims). In the simple district-line-drawing/gerrymandering situation, where consideration of politics and even partisanship has been all but

conclusively sanctioned, the plaintiff's claim is not that her vote has been diluted, but that she has been denied her general Equal Protection (or First Amendment) right to participate in a governmental process free from the taint of impermissible motives. A vote-dilution claim is different, and simpler: it is that the citizen's vote is quite literally being counted for less than other citizens' votes. As the Court put it in *Reynolds*: "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." 377 U.S. at 568. So too is it impaired when its weight is diluted when compared to votes of citizens of other political parties. It is impossible to see why impermissible dilution caused by geographic differences can be made permissible by mere dint of the fact that the legislators were seeking to subordinate or disfavor the voter's political viewpoints. If anything, such dilution should be all the more impermissible. And indeed, this Court has indicated on several occasions that population deviations cannot be justified by interests in partisan dominance. *See Abate v. Mundt*, 403 U.S. 182, 187 (1971) ("We emphasize that our decision [to uphold a county-wide redistricting plan] is based . . . on the fact that the *plan before us does not contain a built-in bias tending to favor particular political interests* or geographic areas.") (emphasis added); *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969) ("But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities.").

Furthermore, to the extent that population deviations of less than ten percent require justification, it has long been established that such deviations must be justified by a *legitimate* state interest. *Reynolds*, 377 U.S. at 579 (noting that deviations should be based "on legitimate considerations incident to the effectuation of a rational state policy"). It is

abundantly clear that the electoral success of a particular political party is not a legitimate state interest in any circumstance. Indeed, there is little that is more inconsistent with basic democratic principles and concepts of the public interest than the notion of a partisan political machine using its control over the levers of government to perpetuate its power by diluting the voting rights of citizens with a different party affiliation. *See El-Amin v. State Bd. of Elec.*, 717 F. Supp. 1138, 1141 (E.D. Va. 1989) ("[F]ew prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which voters, in theory, can register their dissatisfaction by choosing new leadership.") (quotation omitted); *Mountain States Legal Foundation v. Denver School Dist.*, 459 F. Supp. 357, 360 (D. Colo. 1978) ("A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office.") (quotation omitted).

The three-judge panel's assumption that deviations of less than ten percent could be justified by political considerations was clearly wrong, which makes its rejection of plaintiffs' evidence of regional favoritism suspect at best. Given those errors, as well as the panel's improper application of the "ten percent rule," it is readily apparent that the grant of summary judgment by the court below was inappropriate. Probable jurisdiction should be noted, and the decision below should be reversed.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

JEFFREY M. WICE
P.O. Box 42442
Washington, D.C. 20015
(202) 494-7991

RONALD A. KLAIN
JONATHAN D. HACKER
(*Counsel of Record*)
CHARLES E. BORDEN
DAVID P. BERGER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

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